FOREIGN JUDGMENTS

THEIR EFFECT IN THE

ENGLISH COURTS.

BY

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"*A Theory ought, I think, to bide its time, until the free conflict of discovery, argument and opinion has won for it recognition.*"

Professor TYNDALL.

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TO

LORD BLACKBURN

PREFACE.

NO one who has had occasion to study the leading cases on the subject of the effect of Foreign Judgments in the English Courts, can fail to have been impressed with the diversity of principles contained in them. This will I hope sufficiently account for what may appear the somewhat arbitrary manner in which I have made use of the authorities.

The subject itself, one of judge-made law, will I trust be considered a valid excuse for giving so many verbatim extracts from judgments.

I am under a great debt of gratitude to Mr: Frederick Whinney and to Mr: Shelford Bidwell, of Lincoln's Inn, for many valuable suggestions and for much patient revision of the whole work.

F. T. P.

4, ESSEX COURT, TEMPLE,
June, 1879.

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ERRATA.

PAGE 2, line 22, after if, *dele* comma.
„ 5, „ 2, for tribunal, read tribunals.
„ 11, „ 2 from bottom, after sanction, insert comma.
„ 28, „ 23, for *proveritate*, read *pro veritate.*
„ 29, „ 3, *id*: *id*:
„ 79, „ 5 from bottom, after forward, insert full stop.
„ 83, margin—the reference to *Copin* v. *Adamson* in the Court of Appeal should be: L. R. 1 Ex: D. 17.
„ 110, „ After 'cf: Mrs: Bulkley's case,' add, p. 181.

INTRODUCTION.

In this treatise I have endeavoured to discuss as fully as possible the various phases of the doctrine of Foreign Judgments.

The subject is divided primarily into two heads :

under the first, the principles on which the Courts act when a Foreign Judgment is sought to be enforced :

this I have called 'The Enforcing.'

under the second, the principles of the recognition accorded to a Foreign Judgment when it is pleaded in bar to an action:

this I have called 'The Recognising.'

The conflicting doctrines of 'Comity,' and of 'Obligation,' are separately stated and reviewed : the authorities in favour of each proposition being collected, and set out as fully as has appeared necessary to the consideration of the subject :

the advantages of, and objections to either doctrine have been considered and explained :

the objections raised by Mr: Justice, now Lord, Blackburn to the old doctrine of 'Comity' have been specially examined.

Frequent use being made of Austin's 'Lectures on Jurisprudence,' and the meaning of the terms 'Obligation' and 'Sanction' being accurately defined, a doctrine of 'Obligation and Comity' has been suggested: the advantages of which are pointed out ;

it is believed that this doctrine is not open to Lord Blackburn's objections to the doctrine of 'Comity.'

The necessity of International Comity forming part of the doctrine is theoretically considered:

the existence of an International auxiliary sanction is established:

and the fundamental agreement between the civil and the criminal view of the case is pointed out.

The three doctrines, being placed in juxtaposition, are reviewed together.

The English doctrine of *res judicata* is stated:

two considerations are involved: the 'rationale,' and the 'extent': each being separately discussed, its application to the case of a Foreign Judgment is considered.

the old doctrine of the absoluteness of the judgment as *res judicata* is reviewed, the authorities in favour of it being set out:

by means of an elementary mathematical process, a result is arrived at, which is a modification of the old doctrine:

the different phases of the later and opposite doctrine, with those attendant upon it, are separately discussed:

the attendant doctrines are—non-merger in a Foreign Judgment of the original cause of action—and, the Foreign Judgment being *primâ facie* evidence of the debt:

the several results and anomalies are pointed out, together with those of the old and the modified doctrines:

this modified doctrine is suggested as being the one on which the Courts may possibly act in the future.

The subject of concurrent suits and injunctions is discussed.

The 'extent' of the doctrine is applied to Foreign Judgments.

The principles of defence to an action on the judgment, as stated by Lord Blackburn are defined; and the several defences that have been raised are reviewed in turn.

Judgments *in rem* are considered, both of the English and of Foreign Courts:

the essential difference between judgments *in rem* and *in personam* being pointed out, the theory in relation to the latter is, by an enlargement of the terms employed, applied to the former:

the judgments are divided under four heads; and this application of the theory is found in each case to be in accordance with authority.

The converse of Judgments *in rem*—acquittals—are briefly considered.

Decisions on the subject of *Status* are discussed separately, and under these heads—

Marriage—Divorce—Legitimacy—Guardianship—Lunacy—Probate—Bankruptcy.

Finally, this result is arrived at: that, whether the Foreign Judgment be *in rem;* or whether it be *in personam;* whether it form the subject of a claim, or of a defence; there is one Theory, of universal application.

FOREIGN JUDGMENTS.

Chapter I.

CHAPTER I.—THE ENGLISH DOCTRINE.

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By the term Foreign Judgment, we understand a judgment that has been pronounced by a Foreign Court of competent jurisdiction; including under the word Foreign, not only alien states, but also

Definition.

the British Colonies and possessions, the Channel Islands and the Isle of Man.

Scotch and Irish Judgments. 31 & 32 V. c. 54.

Judgments in Scotland and Ireland are, by the 'Judgments Extension Act, 1868' (31 & 32 *Vic:* c. 54), made equivalent in their operation to English Judgments.

The purport of this treatise is to consider what is the effect of a Foreign Judgment when it comes before an English Court: how far the English Courts will recognise the decisions of the Courts of another jurisdiction;—and here 'there is 'a preliminary distinction: where it is tried to 'enforce it; where it is pleaded as a bar to the pro-'ceedings instituted by the person who has failed 'against the same defendant, with reference to the 'same subject matter' (Romilly, M.R., *Reimers* v. *Druce*).

The preliminary distinction. *Romilly, M. R.*

Reimers v. Druce. 26 L. J: Ch: 196.

The method pursued to obtain the benefit of a foreign judgment in this country is by bringing an action to enforce it; and the questions are, first: whether the English Courts have power to enforce it; if having power, whether they will enforce it, and what principles will be taken as their guide; secondly, to what extent the defendant shall be allowed to answer the plaintiff's claim: In this case, the plaintiff brings the foreign judgment before our Courts: but when the defendant produces the judgment as a bar to an action instituted against him by the plaintiff, the question then to be answered is: how far the matter shall be treated as *res judicata.*

Division of the subject.

Therefore the heads under which the effect of a Foreign Judgment is to be considered are:—

A. THE ENFORCING—an action being brought upon it.

B. THE RECOGNISING—it being pleaded in bar.

Chapter I.

A.

THE ENFORCING:—

The enforcing.

A foreign Court has adjudged the defendant liable to pay the plaintiff, say, a certain sum of money: there is an obligation existing in the foreign country—to obey the decision of the Court in that country: before paying the money, the defendant (supposing him to have been resident within the jurisdiction of the Court) leaves the country, and comes to England. The plaintiff finding the debtor in England, desires to make the English Courts the medium for the recovery of the money adjudged to be due to him.

The conflicting Theories.

Upon what principle can this be done? There has been much conflict of opinion: and the conflict is between two theories; one of which may be termed for convenience 'the earlier'; the other, 'the later' theory: although Judges of the present day have given their adhesion to the earlier doctrine.

Comity.

That doctrine is somewhat as follows: That we are bound by the COMITY OF NATIONS to enforce here the decisions of foreign Courts:—this is the doctrine of COMITY pure and simple.

Obligation.

The later theory rejects altogether the notion of Comity, and asserts that the rationale of the enforcing these decisions by the English Courts is, by reason of a legal obligation created by the foreign judgment, which should, or must, be obeyed everywhere:—this is the doctrine of 'OBLIGATION' pure and simple.

Result of discussion anticipated.

We will discuss each doctrine separately, weighing the authorities on the one side and on the other: but we may venture here to anticipate the result of the discussion, and the conclusions at which we have

arrived in this treatise, by stating—with some diffidence, contemplating the weight of the authorities to be contended with—that we consider that either doctrine is to a certain extent correct; but that neither is so correct as to conclude the whole subject.

Doctrine of Comity. Definition. *Blackburn, J.*

The doctrine of COMITY is this:—that it is an 'admitted principle of the law of nations, that a 'state is bound to enforce within its territories the 'judgment of a foreign tribunal'—(These are the words of Blackburn, J., in *Godard* v. *Gray*, when he was refuting the doctrine). The authorities in its favour are as follows:—Lord Ellenborough, C.J., in *Alves* v. *Bunbury*:—'By the *comitas gentium*, the 'Courts of different countries will recognise and 'enforce the judgments of each other: but they 'must be authenticated.' And again in *Power* v. *Whitmore*:—'By the Comity which is paid by us to 'the judgment of other Courts abroad, we give a 'full and binding effect to such judgments, as far as 'they profess to bind the persons and property im- 'mediately before them in judgment, and to which 'their adjudications properly relate.' Lord Kenyon C.J., in *Geyer* v. *Aguilar*:—(The judgment was *in rem*, pronounced by a French Admiralty Court: but the judgments of both Lord Kenyon, C.J., and Ashurst, J., are of general application to all foreign decisions). 'We decide this case bound and 'shackled by certain rules from which we dare not 'depart. Civilised nations profess to be governed 'by certain rules, and the Comity due from the 'Courts in one country to those in another induces 'them to give credit to each others acts. There is 'the same Comity between the different Courts in 'this kingdom.' And Ashurst, J.:- 'A Foreign Judg- 'ment is conclusive on us.' Cockburn, C.J., in

Authorities in favour of the doctrine.

Ld: Ellenborough, C. J.

Ld: Kenyon, C. J.

Ashurst, J.

Godard v. *Gray*. L. R. 6 Q. B. 139.

Alves v. *Bunbury*. 4 Camp: 28.

Power v. *Whitmore*. 4 M. & S. 141.

Geyer v. *Aguilar*. 7 T. R. 681.

Chapter I.

Castrique v. *Imrie*. 30 L. J: C. P. 177.

Messina v. *Petrococchino*. L. R. 4 P. C. 144.

Houlditch v. *Donegall*, 2 Cl: & Fin: 470.

Castrique v. *Imrie*:—'The Comity of Nations, by 'virtue of which alone the judgments of the tribunals 'of one country are respected in those of another.' *Cockburn, C.J.*

Sir R. Phillimore, delivering the judgment of the Privy Council, in *Messina* v. *Petrococchino*, and approving the doctrine:—'It is to be observed that, 'though the earlier cases exhibit some fluctuation 'and variety with respect to the application of this 'doctrine; it has become firmly established by a 'series of later cases as an unquestionable maxim 'of our jurisprudence.' *Sir R. Phillimore.*

Lastly, Lord Brougham, L.C. 'in *Houlditch* v. *Marquess of Donegall*:—'A Judg- 'ment of a foreign Court of record may be made 'the ground of proceeding in the Courts of this 'country; and the great rule of all civilized coun- 'tries among each other is, that a judgment in any 'one of them may be made the ground of proceed- 'ing validly and with effect in this country; but no 'more.' *Ld: Brougham, L.C.*

Of the objections to this doctrine of Comity, perhaps the most important is, its uncertainty and vagueness; and consequent upon this uncertainty, the difficulty of establishing what can be received as a defence to the action: It is impossible to define its limits. There existed the principle *in nubibus:* there existed arbitrary exceptions to it, each case depending upon the discretion of the Judge: The ultimate limit, that we were *bound* to enforce by reason of the Comity, seemed to suggest the difficulty, if bound, how could a defence possibly be admitted:—this was manifestly an injustice: One defence and then another came to be allowed, till at last one was invented—to be more fully considered hereafter—that Natural Justice would be violated if the Court enforced the judgment:—Thus Lord Mansfield, C.J., in

Its uncertainty.

Its apparent limits.

Ld: Mansfield, C.J.

and *Ld: Hardwicke, L.C.* *Sinclair* v. *Fraser,* following Lord Hardwicke, L.C. :—'When you call for my assistance to carry 'into effect the decision of some other tribunal, 'you shall not have it, if it appears that you are in 'the wrong.' 'And on that account,' said Buller, J., 'in *Galbraith* v. *Neville,* 'he would examine into 'the propriety of the decree.' 'This,' he adds, 'is 'the true doctrine.' Here was the other extreme ; and this seemed to suggest the difficulty, that almost everything that could be alleged against the Judgment would have to be admitted.

Sinclair v. *Fraser.* 1 Dougl: 5.

Buller, J.

Galbraith v. *Neville.* 1 Dougl: 6n.

Its vagueness. *Story,* § 598.

As to the vagueness of the doctrine we may cite Story :—'In a suit brought by a party to enforce 'a foreign judgment, it is often urged, that no 'Sovereign is bound *jure gentium* to execute any 'foreign judgment within his dominions ; and 'therefore, if execution of it is sought in his 'dominions, he is at liberty to examine into the 'merits of the judgment, and to refuse to give 'effect to it, if upon such examination it should 'appear unjust and unfounded. He acts in 'executing it upon the principles of Comity ; and 'has therefore a right to prescribe the terms and 'limits of that Comity' (Conflict of Laws, § 598).

What is Comity?

But what is this Comity of Nations ? Its essential characteristic is mutuality, or reciprocity. If there be such a thing, it must exist as a governing and mutual principle, and cannot be subject to variation at the will of one Sovereign, without also suffering a corresponding variation on the part of the Sovereign of the other state, the relations between them being reversed. And not only this ; it is 'of Nations' : for there is not one Comity between certain states, and another Comity between certain other states ; but one for them all. A variation or diminution at the will of one Sovereign, or

Reciprocity essential.

Chapter I.

agreed to between two Sovereigns, would necessarily vary or diminish the Comity existing between all other states. Thus successive prescriptions of the terms and limits of this particular Comity, would in the end annihilate it.

This essential reciprocity is noted by Blackburn, J., in *Schibsby* v. *Westenholz* :—'If the principle be 'what is loosely termed a Comity, we could hardly 'decline to enforce a foreign judgment given in 'France against a resident in Great Britain under 'circumstances hardly, if at all, distinguishable 'from those under which we, *mutatis mutandis*, 'might give judgment against a resident in 'France :—but it is different if the principle be as 'Baron Parke has stated it' : This leads us to the consideration of the doctrine of OBLIGATION.

Schibsby v. Westenholz. L. R. 6 Q. B. 155.

Blackburn, J.

This doctrine came into being in 1845, in the case of *Russell* v. *Smyth*, where it was first enunciated by Parke, B., and repeated by him in *Williams* v. *Jones*. The learned Baron's judgment in the latter case was as follows :—'The principle in 'this case is, that where a competent Court has 'adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt 'to enforce the judgment may be maintained. It 'is in this way that the judgments of foreign and 'Colonial Courts may be supported and enforced.' This was approved, as we have seen, in 1870, in the two cases of *Godard* v. *Gray*, and *Schibsby* v. *Westenholz*; by Blackburn and Mellor, JJ. in the former; and by Blackburn, Mellor, Lush and Hannen, JJ. in the latter :—'It is not an admitted 'principle of the law of nations that a state is 'bound to enforce within its territories the judgment of a foreign tribunal. Several of the conti-'nental nations (including France) do not enforce

Russell v. Smyth. 9 M. & W. 810.

Williams v. Jones. 14 L. J: Ex: 145.

Godard v. Gray. L. R. 6 Q. B. 139.

Doctrine of obligation.

The definition of *Parke, B.*

Approved.

Blackburn, J.

'the judgments of other countries, unless where 'there are reciprocal treaties to that effect. But in 'England, and in those states which are governed 'by the Common Law, such judgments are enforced, 'not by virtue of any treaty, nor by virtue of any 'statute, but upon a principle very well stated by 'Baron Parke' (*Godard* v. *Gray*).—'The judg- 'ment of a Court of competent jurisdiction over 'the defendant to pay the sum for which judgment 'is given, which the Courts of this country are 'bound to enforce' (*Schibsby* v. *Westenholz*).

Godard v. *Gray.* L. R. 6 Q. B. 139.

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

It is capable of sharp limitation.

Here then we have a sharply defined principle; and consequent upon its certainty, a possibility of clearly tracing strict rules for the admission or rejection of defences to the action:—'Anything that 'negatives the existence of the legal obligation, or 'excuses (or forms a legal excuse for) the perform- 'ance of it, must form a good defence'—for example the plaintiff's fraud.

Black-burn, J.

But requires careful examination.

But however convenient the application or the result of the principle, the principle itself must be examined attentively.

Especially as to the terms used.

Two terms have been used which require explanation: 'Common Law'—'Legal Obligation.'

'Common Law.'

What are we to understand by the phrase, 'England and those states which are governed by the 'Common Law'?

Blackstone's definition. Stephen's ed: vol: I. p. 10. p. 41.

In England there is 'an ancient collection of un- 'written maxims and customs which is called the 'Common Law,' as distinguished from Acts of Parliament, or Statute Law. 'These customs 'receive their binding power, and the force of laws, 'by long and immemorial usage, and by their 'universal reception throughout the kingdom.' Blackstone always uses Common Law as meaning *the proper Law of England*, and as expressing

Chapter I. 'the institutions which are not founded on any p. 45.
'known statute, but upon custom only.' So we may take it, that in countries where there is no code, if the Courts acknowledge the existence of any mass of ancient customs and unwritten maxims, this is the Common Law of that country. The English Colonies adopt English Common Law. In the United States, the Courts recognise as Common Law, those customs and maxims which were Common Law to the English Courts at the time of the Declaration of Independence. In Germany there is a Common Law, though it is rapidly giving way to a series of codes.

One sense of the term may be equivalent to *Jus Gentium*.

Thus we see, that the 'Common Law' which is used by Blackburn, J., *may* be taken to mean, a series of ancient customs and unwritten maxims, common to the Common Laws of different states; in other words, a *Jus Gentium*. And the effect of the principle is; that, in that brotherhood of states acknowledging this Supreme Common Law, there is among the citizens a common right to use the first Court of Justice that is handy to them, to enforce a decision obtained in any other Court: That the judgment, *quâ* the plaintiff, is a thing to be carried, as it were, in the pocket, and enforced anywhere;—*quâ* the defendant, is the badge of the necessary obedience to it, which may be compelled anywhere at the pleasure of his adversary. Can such a thing exist? or rather, does it exist? It is a state suggestive of the description of civil laws, which Hobbes gives in his 'Leviathan': 'By civil laws, I 'understand the laws that men are bound to 'observe, because they are members, not of this or 'that commonwealth in particular, but of a com-'monwealth.'

Consequent effect of the principle.

Hobbes' definition of civil laws.

But, assuming that all that is to be understood by The other

sense in which the term may have been used.

this phrase, is;—those states where English Common Law prevails, the doctrine takes another form:—There is a judgment pronounced by a Court having authority to do so: there is therefore raised by this judgment a legal obligation to obey it: (using this term 'legal obligation' in the sense that Blackburn, J., has used it). This legal obligation is in fact, to pay the debt which the foreign Court has pronounced to be owing: The English Court cannot but suppose that the foreign Court has acted rightly, and it has declared the debt to be owing; therefore, in the eyes of the English Courts, there *is* a debt owing: Brought before them, the legal obligation becomes a moral obligation: There is among the ancient unwritten maxims of our Common Law—which is a moral law—one maxim 'render to everyone his due:' That maxim must be applied, and the defendant who would evade his country's just decision, must be compelled to obey that judgment, even though he is beyond the jurisdiction of the Court that has pronounced it; he must pay the debt he owes:—And that this is no exaggerated exposition of this phase of the doctrine of obligation, we may cite Lord Abinger, C.B., in *Russell v. Smyth* (the same case it is to be remembered, that originated Baron Parke's enunciation of the doctrine):—'Foreign judgments are 'enforced here, because the parties against whom 'they are pronounced, are bound in duty to satisfy 'them.'

The moral obligation enforceable by English Common Law.

Ld: Abinger, C.B.

Russell v. *Smyth.* 9 M.& W. 810.

Austin. Jurisprudence, I. p. 467.

Austin thus distinguishes between duty and obligation in its strict sense. 'The English *duty* (looking at its 'derivation) rather denotes *that* to which a man is obliged, 'than the obligation itself. It is derived through the 'French *devoir* (past part:) and the Italian *dovere*, from 'the Latin *debere*. It is, therefore, equivalent to *id quod* '*debitum est*, rather than to *obligatio*.'

Duty—its derivation.

Chapter I.

This dictum of Lord Abinger much resembles that 'example from Lord Mansfield, of the tendency to confound 'positive law with positive morality, and both with legisla- 'tion and deontology'—which Austin quotes. 'By the p. 224. 'English law, a promise to give something or to do some- 'thing for the benefit of another is not binding without 'what is called a consideration, that is, a motive assigned 'for the promise, which motive must be of a particular 'kind. Lord Mansfield, however, overruled the distinct 'provisions of the law by ruling that moral obligation was 'a sufficient consideration. Now moral obligation is an 'obligation imposed by opinion, or an obligation imposed 'by God: that is, moral obligation is anything which we 'choose to call so, for the precepts of positive morality are 'infinitely varying, and the will of God, whether indicated 'by utility or by a moral sense, is equally matter of dispute. 'This decision of Lord Mansfield, which assumes that the 'judge is to enforce morality, enables the judge to enforce 'just whatever he pleases.'

Obligation and sanction.

Now, every obligation imports a sanction: A moral obligation, a moral sanction:—a legal obligation, a legal sanction.

Let us for one moment revert to the two phases of the doctrine of obligation which we have been considering. In the first, we found the obligation of obedience to the judgment out of the country was based upon an all-pervading *Jus Gentium*:—there must also exist a *Jus Gentium* sanction; the power of enforcing which resides in the Sovereign Authority of all states under the influence of this *Jus Gentium*.

In the second we have the foreign obligation with its foreign sanction: but when the obligation leaves the country of its origin, and comes into England, its sanction remains behind; and coming before the English Courts, it is regarded by them as a moral obligation, and is clothed with a new sanction, one of English Common Law; the power of en-

forcing which resides in the Sovereign Authority of England.

Sanction and obligation are inseparable.

But these notions are altogether inconsistent with the proposition that every obligation imports a sanction: This proposition implies that not only is a sanction connected with every obligation that is created, but that it is inseparably connected with it. The obligation cannot exist without its sanction; nor the sanction without its parent obligation. To shift one, is also to shift the other; to destroy, or avoid one, is also to destroy or avoid the other. Can then either obligation or sanction be shifted from one jurisdiction to another? The judgment is pronounced in the foreign state:—the sanction comes into being in the foreign state:—but the sanction, that is, the liability to evil, not only resides in the foreign state, but is enforced by the Sovereign Authority of that state; and by that Sovereign Authority alone: The enforcement is of the essence of the Sovereignty; it cannot be taken out of it: Therefore, since the enforcement cannot be removed, neither can the sanction; neither can the obligation:

The juridical unit.

The whole system, Judgment, Obligation, Sanction, Enforcement of the Sanction, forms the unit, which is indivisible.

Conclusion.

Therefore, we arrive at the conclusion, that a judgment debtor of a foreign state, leaving that state, leaves behind the legal obligation (using this term in its strict sense) of obedience to that judgment: and that coming into this country, he cannot be considered a legal debtor here, but only a legal debtor of and in the foreign state.

Destruction of obligation, and avoidance of sanction.

How then is the obligation destroyed; that is, how is the sanction to be avoided? There are two ways:—

first: by obedience to the judgment.

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secondly: by leaving the country, (that is, having once been within the territory:—the case of a defendant resident abroad, being subject to the jurisdiction of the Court by submission or otherwise need not be noticed at this stage). This destruction and avoidance, which will of course be revived by a return to the country, will continue so long as the defendant's absence continues.

Inception of the doctrine of 'obligation and comity.'

But it is manifestly unjust that such a simple expedient of avoiding the sanction should be tolerated; some remedy must be found:—The debtor has fled to another state; that state must be asked to enforce a sanction which is foreign to its authority; it must be asked to lend the aid of its Courts to do so; this will be a great convenience to the country whose sanction is to be enforced; in return, the position being reversed, it also will enforce the sanctions of the other state.

This, though a purely theoretical view of the case, does in fact take place in some cases.

Phillimore's General Axiom.

Sir R. Phillimore — International Law — Vol. IV. MDCCCCXXX: '*General Axiom*—No state allows a foreign 'judgment to be executed within its territory, except under 'the authority, and by order of its own tribunal. The 'practice of states varies, whether the judgment is executed at the instance of the party, (*simple demande or requête*): 'or by formal requisition of the Foreign Tribunal, (*com-'mission rogatoire*).'

Now this process of inter-state arrangement being repeated between these and other states, would in time become an inter-state, or international custom: and, being a custom, which is essentially courteous; and being reciprocal; it is a custom which falls under the head of International Courtesy or Comity: in other words, what is generally understood by Comity of Nations:

the widest definition of which is—'all those praise-worthy acts of one nation towards another which are not *stricti juris: i.e.*, all that the refusal or withholding of which, although dictated by malevolence is not an injury, and so, not a ground of war.' To the conclusion at which we have already arrived, that the judgment-debtor of one state cannot be regarded as a legal debtor in another, we may therefore add; that a state where such debtor is found, will lend its aid to enforce the sanction; or rather, will clothe the foreign obligation with a sanction, which will stand in the place of the one the foreign state is powerless to enforce.

Woolsey. Int: Law, § 24.

Further conclusion.

Treaty.

[Between some states, there exist treaties by which they mutually enforce the judgments of each other: It is easy to see how Comity is here replaced by Treaty.]

Sanctions classified. *Markby*, p. 241.

Nor is this practice unreasonable or impolitic:—for sanctions are *intermediate;* which merely command a person to do something, with the prospect of incurring certain further consequences if he do not: and *ultimate;* the evil consequence of disobedience to the command, (whether it be in the form of a law, or of a judgment), which it is supposed the person would be desirous of avoiding. In the Courts of Civil Procedure, the sanction made use of in the first instance is always the one we have termed intermediate: the ultimate sanction of penalty, or rarely imprisonment, is only made use of as the last resource. But in the Courts of Criminal Procedure, the ultimate sanction is invariably used.

Sanction in civil cases.

Sanction in criminal cases.

In the case therefore of an escaped criminal, it would be unreasonable and impolitic to ask a foreign state to enforce the ultimate sanction of imprisonment or death; no benefit could accrue there-

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from, for the man has committed no crime in the foreign state: it is in the state to which he is subject that he has committed the offence; and it is in that state, and by the Sovereign Authority of that state alone that the penalty can be inflicted, and the wrong to that community be vindicated. Moreover, the sanction in criminal cases is enforced at the discretion of the sovereign. *Austin* I. p. 518.

Extradition.

In order therefore that such vindication may be effectually consummated, there have been made Extradition Treaties between states. By these Treaties, not only are escaped criminals handed over to their governments, but also suspected persons, in order to take their trial.

Considered theoretically.

This result might also have been arrived at, by the same process as before: thus the recovery of criminals may have been effected, first, by mutual arrangement; which, having solidified into a rule of International Comity, has finally given way to Treaty. But, on account of the paramount importance to the community of each state, of having its own violated laws vindicated before its eyes, Treaties have become almost universal between civilised states. Indeed, Story asserts that the practice has 'beyond question, prevailed as a 'matter of Comity, and sometimes of Treaty, be- 'tween some neighbouring states; and sometimes 'also between distant states having much inter- 'course with each other.' (Conflict of Laws, § 626.) *Story*, § 626.

Sanction in civil cases.

But in civil cases there is no such necessity; the wrong is not against the community at large, but against an individual. The sanction, though resident in the Sovereign Authority, is enforced at the instance and discretion of the injured party. So long as he has redress, it is a matter of little moment how or where he obtains it: the com-

munity has really no interest in the matter, for although the remote or paramount end of a civil sanction is the prevention of offences generally, yet it does not affect the interests of the community that the redress was obtained through the instrumentality of another state, whose course of action has been guided by the principles of an International Courtesy.

The proposition stated.

Our conclusion may now be stated in the form of a proposition:—States lend their aid mutually to enforce each other's judgments:—

There is a legal obligation existing against the debtor in the state where the judgment has been pronounced; by reason of the debtor's absence from the jurisdiction of its Courts, the state is unable to enforce the sanction.

By virtue of the Comity of Nations, a foreign state, to which the debtor has gone, will clothe the obligation deprived of its correlative sanction, with another sanction auxiliary to it; and by so doing will endue it with the power it has lost.

This I have called the doctrine of OBLIGATION AND COMITY.

A third doctrine suggested.

Before fully considering this new doctrine, its advantages may be briefly stated: but we must bear in mind that a doctrine, however advantageous, should not be accepted, if it is based upon erroneous principles.

Its chief advantage.

It will be observed to combine the earlier and the later doctrines: adding to the broader international principle of Comity, the precision of the legal principle of Obligation.

Summing up the arguments that have been used, the principles upon which the doctrine is founded are as follows:—

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Principles involved in the doctrine of Obligation and Comity.

a. A Court of competent jurisdiction has pronounced a judgment :—

therefore, an obligation and sanction have arisen.

b. The defendant is out of the jurisdiction of the Court: the sanction is absolutely fixed in the Sovereign Authority :—

therefore, the Sovereign cannot enforce the sanction.

c. The defendant is within the jurisdiction of a Foreign State: The Comity of Nations has created a second, or auxiliary sanction, resident in the Foreign Sovereign Authority :—

therefore, this sanction may be enforced against the defendant, at the discretion and instance of the judgment creditor.

Principles it negatives:

And the principles which it negatives are those contained in the two views of Lord Blackburn's theory, above enunciated: viz :—

First view of doctrine of Obligation.

a.' A Court of competent jurisdiction has pronounced a judgment :—

therefore a *Jus Gentium* obligation and sanction have arisen.

b.' The defendant is out of the jurisdiction of the Court :—

therefore the *Jus Gentium* obligation and sanction have accompanied him.

c.' The defendant is within the jurisdiction of a Foreign State acknowledging this *Jus Gentium*: The same *Jus Gentium* sanction which has once been created, is also resident in the Foreign Sovereign Authority :—

therefore this sanction may be enforced

against the defendant, at the discretion and instance of the judgment creditor.

Or—

Second view of doctrine of Obligation.

a." A Court of competent jurisdiction has pronounced a judgment:—

therefore a debt and universal duty to pay have arisen.

b" The defendant is out of the jurisdiction of the Court:—

therefore he carries with him the debt and duty to pay.

c." The defendant is within the jurisdiction of a Foreign State acknowledging the principles of 'English Common Law': The mere existence of a debt and duty to pay anywhere creates an 'English Common Law' sanction, resident in the Foreign Sovereign Authority:—

therefore this sanction may be enforced against the defendant at the discretion and instance of the judgment creditor.

Doctrine of Comity not entirely negatived.

It does not negative the *fundamental principle* of the old doctrine of Comity; but it defines positively and clearly what is enforced.

The principles *a* and *b* have already been discussed: *c* remains to be more fully considered.

The auxiliary sanction.

A second or *auxiliary sanction* is created:—this at first sight seems to create the difficulty, that we have a sanction resident in and enforced by a Sovereign Authority, created by its Courts, but without a corresponding obligation created in the jurisdiction of that Authority: In reality, this is not so: the word 'auxiliary' tends to remove the apparent difficulty.

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Now, a sanction is understood to reside in the Sovereign Authority of the State: its existence is an essential characteristic of Sovereignty: More accurately, it is one of the powers, the aggregate of which, possessed by the rulers of a political society, is called Sovereignty. *Markby*, p. 3.

The origin of this aggregate of powers is that habitual obedience to the government which is rendered by the bulk of the community. The habitual obedience is partly the consequence of custom, and partly the consequence of prejudices. It is this obedience that causes the government to exist in the form of a monarchy, or of a popular government, according to the tendency of these prejudices. This obedience is also bottomed in the principle of utility;—for positive moral rules are uncertain, scant, and imperfect: Hence the necessity for a common governing (or common guiding) head to whom the community may in *concert* defer.

An analogy traced between Law proper and International Law. cf: *Austin*, Lect: VI., p. 302 and note 28.

It is indeed possible to conceive a society in which legal sanctions would lie dormant; or in which *quasi*-government would merely recommend or utter laws of imperfect obligation (in the sense of the Roman Jurists). But however perfect and universal the inclination to act up to rules tending to the general good, it is impossible to dispense with a governing or guiding head. Upon this obedience, therefore, depends the existence of the sanction.

Again, taking the aggregate of Sovereign Authorities, popularly known as the Family of Nations: The citizens of this great Family are the Governments of the various States. There is no Supreme Sovereign Authority, for all the members are considered equal: but there is a body of rules to which all profess habitual obedience, called

International Law, the ultimate sanction of which is war: and a lesser body of rules, simply regulating the courteous intercourse between the members, which all do habitually obey, called the rules of International Courtesy, or the Comity of Nations; these rules have not war as their ultimate sanction.

The origin of this *quasi*-sovereignty (the personality of which does not exist) is also habitual obedience rendered by the bulk of the Community of States. This obedience is partly the consequence of custom (but not of prejudices), and is also bottomed in the principle of utility.

Now we have seen that a power resides in every member of the Community of States, to enforce the judgments of other states, by means of an auxiliary sanction which has been created by theComity of Nations.

Result of the theory.

The result is, that not only is an obligation created, the sanction correlative to which is resident in the Sovereign Authority of the State whose Courts have pronounced the judgment, and which may be enforced there at the discretion and instance of the judgment creditor; but there also comes into being in every other state a bare obligation — resembling somewhat the *nudum pactum* of the Roman Law—which, when the judgment debtor enters any Foreign State, the Sovereign Authority of that State clothes with an auxiliary sanction—enforceable at the discretion and instance of the foreign judgment creditor; and dependent upon International Comity.

Necessity of an application to the Courts of the

But although a sanction in the country of its origin, is always enforceable without further application to the Courts: in this case, application to the Courts of the Foreign State is necessary, in order

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to establish to the satisfaction of the Sovereign Authority in whom the auxiliary sanction is resident, that the foreign obligation does in fact exist. Foreign State.

The doctrine of Obligation and Comity is therefore, we venture to think, complete in all its parts: The theory of the auxiliary sanction created by Comity; and the theory of the existing obligation both appear to be sound: There is no difficulty in at once adopting Lord Blackburn's definition of the essentials to a good defence, because the practical part of the doctrine of obligation exists entire. Therefore, as before stated, we take those essentials to be, 'to negative the existence of the 'obligation; or to excuse the performance of it.'— What these defences may be, will be considered in the next Chapter. The principle of defence to the action.

Lastly; is the doctrine of Obligation and Comity open to the objection taken by Lord Blackburn to the earlier doctrine of Comity pure and simple? 'If the principle be what is loosely 'called a Comity.'—we have endeavoured to define accurately what this Comity among nations is, and to shew that 'loosely' is no longer a term to be applied to it. But we have not yet traced to its source that Courtesy which in reality is interchanged. Once more we must quote the learned judge:—'If the principle be what is loosely called 'a Comity, we could hardly decline to enforce a 'foreign judgment given in France against a resident 'in Great Britain, under circumstances hardly, if at 'all, distinguishable from those under which we, '*mutatis mutandis*, might give judgment against a 'resident in France.' (*Schibsby* v. *Westenholz*). The reference is to the Common Law Procedure Act 1852, sections 18 and 19, relating to service out of Comity being accurately defined, *Ld: Blackburn's* objections no longer exist. *Blackburn, J.*

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

the Jurisdiction. Under that Act, a certain course was to be pursued (which has been varied by the Judicature Acts) against a non-resident defendant. Supposing the Courts of another country—having also a course of procedure against non-resident defendants peculiar to itself—should proceed against an Englishman not resident in that country, in a manner not in accordance with their own procedure, but in a manner 'hardly, if at all 'distinguishable' from our own method: Then, says Lord Blackburn, we should be bound to enforce it, were we fettered by this loosely-termed Comity. We venture thus far to agree with this reasoning: for, under the doctrine of obligation, other considerations arise to assist the Courts in deciding whether, under such circumstances they would enforce it or not. But, if the Foreign Court, following its own peculiar procedure against non-resident defendants, pronounce a judgment against an Englishman not resident in that country: Then, that judgment coming before English Courts, will be upheld and enforced; first, under the influence of the Comity of Nations; secondly, on account of the obligation created.

Procedure against non-resident defendants.

cf: 'Assumed Jurisdiction.' Chapter II.

A similar point arose in *Alivon* v. *Furnival*, an action of debt by two out of three syndics of a French bankrupt, upon an arbitral sentence and ordinance adjudging that the defendant should pay a sum of money to the bankrupt. Parke, B., said:—'The two out of three suing is a peculiar right 'of action created by the French law, and we think 'it may, by the Comity of Nations, be enforced 'here.'

Alivon v. *Furnival*, 3 L. J: Ex: 241.

Parke, B.

The courtesy that is interchanged.

And this is a logical deduction from the principle: The Courts of different states, by courtesy enforce, each for the other, not *lex* for *lex*, but *jus* for *jus*.

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THE RECOGNISING :—

The Recognising: *Story*, § 598.

'But it is otherwise, it is said,' says Story, 'where the defendant sets up a foreign judgment as a bar to proceedings; for if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a suit elsewhere, and thus bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatæ*, under such circumstances, is entitled to universal conclusiveness and respect. This distinction has been very frequently recognised as having a just foundation in international justice.' (Conflict of Laws, § 598.)

Eyre, C.J.

To the same effect is the judgment of Eyre, C.J., the dissentient Judge in *Phillips* v. *Hunter* :—'It is in one way only that the sentence or judgment of a foreign Court is examinable here; that is, when the party who claims the benefit of it applies to our Courts to enforce it: when it is thus voluntarily submitted to our jurisdiction . . . . In all other cases, we give entire faith and credit to the sentences of foreign Courts, and consider them as conclusive upon us.'

Phillips v. *Hunter*, 2 H. Bl: 402.

Res Judicata: with reference to an English decision.

Pausing for a moment, let us sketch a brief outline of the plea *res judicata* as it is accepted in our Courts, with reference to English adjudications of the matter; following the judgment of Knight-Bruce, V.-C., in *Barrs* v. *Jackson* :—'With the rule of Civil Law rightly understood, which in the language of Ulpian, says,—*res judicata pro veritate accipitur*,—the law of England generally agrees.'

Barrs v. *Jackson*, 1 Y. & C. C. C. 585. (on app:) 1 Phil: 582.

Knight-Bruce, V.-C.

[*Ulpian.*]

[*Vinnius.*] Vinnius—in a note upon the words 'per excep-
'tionem rei judicatæ'—Institutes, Book IV., Title B.
—says:—'Quæ ita agenti obstat si eadem quæstio
'inter eosdem revocetur, id est, si omnia sint
'eadem, idem corpus, eadem quantitas, idem jus,
'eadem causa petendi, eadem conditio perso-
'narum.'

Knight-Bruce, V.-C. 'Generally, the judgment neither of a concur-
'rent nor of an exclusive jurisdiction, is (whether
'receivable or not receivable), conclusive evidence
'of any matter which came collaterally in question
'before it, though within the jurisdiction, or of any
'matter incidentally cognisable, or of any matter to
'be inferred by argument from the judgment: and a
'judgment is final only for its proper purpose and
'object.'

'It would be unjust and absurd to hold decisions
'upon facts in proceedings *inter partes*, to be con-
'clusive upon the parties for all purposes.'

'The rule against re-agitating matter adjudicated,
'is subject generally to this restriction—that how-
'ever essential the establishment of particular facts
'may be to the soundness of a judicial decision,
'however it may proceed on them as established;
'and however binding and conclusive the decision
'may, as to its immediate and direct object, be,
'those facts are not all necessarily established con-
'clusively between the parties, and that either may
'again litigate them for any purpose as to which
'they may come in question; provided the imme-
'diate subject of the decision be not attempted to
'be withdrawn from its operation, so as to defeat
'its direct object. This limitation to the rule,
'appears to me, generally speaking, to be consis-
'tent with reason and convenience, and not opposed
'to authority. I am not now referring to the law ap-

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'plicable to certain prize and admiralty questions, 'which are governed by principles in some respects 'peculiar.'

'The adjudication in the former action must be 'inconsistent with the notion of the liability in the 'present one.' (Channell, B., *Phillips* v. *Ward.*) *Channell, B.*

Phillips v. *Ward.* 33 L. J: Ex: 7.

'The former suit must be shewn to have been 'one in which there was an opportunity of recover- 'ing that which the plaintiff seeks to recover in the 'second action. (*Nelson* v. *Couch.*)

Nelson v. *Couch.* 15 C. B: N. S. 99.

It does not appear necessary that the judgment should have been satisfied: only that it is final.

As to the identity of the two suits we may cite the following passage from 'Modern Roman Law,' p. 94, by Professors Tomkins and Jencken—'In 'respect to the requisites for the identity of a legal 'contention, two things are needed: *Professors Tomkins and Jencken.*

'I. The *exceptio rei judicatæ* falls to the ground, 'when no identity exists, even though the subse- 'quent action may resemble the former one.

'II. The *exceptio* is maintainable, when the iden- 'tity is actually present, though the previous point 'in litigation and the new one may be somewhat 'dissimilar. In personal actions, identity of right 'results from similarity of origin; but in real rights 'and in real actions, the mode of origin is immate- 'rial.'

On a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue—that is, a replication of Nul Tiel Record is allowed. If the judgment had been recovered for another cause, there must have been a 'new assignment.' A replication was sometimes pleaded in the form of a traverse, that the judgment was not in respect of the same causes of action as in the declaration OLD PRACTICE.

mentioned: (*e.g.*, *Lord Bagot* v. *Williams*), but substantially this was a 'new assignment.' (*Bullen and Leake's Precedents of Pleadings.*)

Bagot v. *Williams*, 3 B. & C. 235.

NEW PRACTICE. O. xix. r. 14.

By Order XIX., rule 14, of the Judicature Acts, the 'new assignment' is replaced by an amendment in the statement of claim.

The considerations involved:

Now, in these principles we have two considerations involved.

(*a*). THE RATIONALE. (*b*). THE EXTENT.

to be applied to Foreign Judgments. *Bigelow.*

We will consider how each of them applies to the recognition by our Courts of Foreign Judgments, when pleaded by a defendant.

'In strict law the doctrine of *res judicata* is only 'applicable to the judgments of domestic Courts. 'But from motives of policy it has been extended 'to the judgments of foreign Courts of civilised 'countries, with certain limitations.' (*Bigelow—Law of Estoppel*, p. 9.)

First Consideration. 'The Rationale.'

(*a*). THE RATIONALE:—With regard to the maxim—that a legal adjudication shall be taken as a synonym for truth; it must be borne in mind, that as referring to English adjudications, although '*res judicata*' is generally raised by way of defence, yet the maxim equally applies when the adjudication forms the subject of an action.

The plaintiff as we have seen, when the defendant brings the judgment before the Court, is only allowed to put in issue the fact of there being such a record: On the same principle, when the plaintiff, bringing an action upon it, produces the judgment, the defendant is only to plead Nul Tiel Record: or else, satisfaction, or release; both of which, merely put the record itself, and not the judgment, in issue.—'A record thus importing credit 'and verity, shall be tried only by itself'—that is, by production and inspection; 'the reason being, that

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'there may thus be an end of controversy.' The plea, either by plaintiff or defendant, must therefore be; that there is no such record; and not, that there is no such obligation. *Broom's* Common Law, p. 262, n.

The full effect then of the defence *res judicata*, the adjudication being that of an English Court is, that it is absolute; the record existing as the defendant states.—Is the same absolute effect to be extended to a foreign adjudication on the subject-matter of the action? The leading authorities in favour of this extension are; the dictum of Lord Chief Justice Eyre in *Phillips* v. *Hunter*, already quoted:—and the more recent judgment of Lord Campbell, C.J., sitting with Lord Lyndhurst, L.C., in *Ricardo* v. *Garcias*. There was a judgment by competent tribunals in France against the Respondent. He then filed a bill in Chancery against some of the same persons and for the same purposes; charging that the proceedings and judgment of the French Court were contrary to justice, and were not final and conclusive: The plea of foreign judgment, set forth in substance and effect, was overruled by the Vice-Chancellor: on appeal, Lord Campbell said:—'A foreign judgment may be 'pleaded as *res judicata;* because the foreign 'tribunal has clearly jurisdiction over the matter, 'and both parties being before the tribunal which 'adjudged between them, that is a bar to a sub-'sequent suit in this country for the same cause.' In favour of this proposition we have also the dictum of Martin, B., in *Cammell* v. *Sewell*, delivering the judgment of the Court: (Pollock, C.B., Martin, Channell, BB.). The difficulty in the case was whether the decision as to the validity of a sale of cargo by the Norwegian Superior Diocesan Court at Drontheim, was in the nature of a judgment *in*

Phillips v. *Hunter*, 2 H. Bl: 402.

Eyre, C.J. cf: p. 23.

Ricardo v. *Garcias*, 12 Cl: & Fin: 368.

Lord Campbell, C.J.

Cammell v. *Sewell*, 27 L. J: Ex: 447.

Martin, B. *rem.* The conclusion of the judgment was as follows :—'But, assuming that the judgment is not 'one in the nature of a judgment *in rem*, it seems 'nevertheless, that it must be taken as conclusive, 'and that the judgment must be taken to be the 'judgment of a Court of competent jurisdiction. 'That judgment has been given against the plain- 'tiffs, and we think they are conclusively bound by 'it : *interest rei publicæ ut sit finis litium.*'

There is no apparent stretch of principle to extend *res judicata* to foreign judgments.

That this should be so, does not seem inconsistent with principle ; for, all that has been advanced as regards the finality of an English decision seems to apply equally to a foreign decision : That there may be an end of controversy, seems as applicable when the first adjudication upon it is that of a Foreign Court as when it is that of an English Court: And there is no apparent stretch of the principle, that one Court of Justice presumes another Court of Justice to have acted rightly, to say, that when the decisions of that other Court come before it in any way, it will extend to them also the application of its Common Law doctrine *res judicata proveritate habetur.* In the words of James, L.J. :—

James, L. J.

'It would be impossible to carry on the business of 'the world, if the Courts in every country refused to 'act upon what had been done by other Courts of 'competent jurisdiction.' (*re Davidson's Settlements.*) The doctrine was very fully expounded in the argument for the respondent in the case of *Hamilton* v. *Dutch East India Co*: in the House of Lords, 1732. The following argument was accepted by the House :—'For that the cause had been judged 'and determined by the Courts of Malacca and 'Batavia, their sentences could not be reviewed by 'the Court of Admiralty in Scotland, which has no 'jurisdiction over these Courts, and that this plea

re Davidson's Settlements. L. R. 15 Eq: 383.

Hamilton v. Dutch East India Co : 8 Bro: P. C. 264.

Argument in House of Lords *Hamilton* v. *Dutch East India Co :*

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'or exception (of *res judicata*) is, by the law of 'nations, available in all Courts, it being an estab- 'lished maxim *quod res judicata proveritate habetur.* 'And though, when a decree pronounced in one 'country is sought to be carried into execution in 'another, the judge whose interposition is demanded 'ought not to afford it, without a previous inquiry 'into the justice of the sentence; yet, when a decree 'is actually executed in the country where it was 'pronounced, it becomes then of no further use 'than to protect the person who has had satisfac- 'tion under it, from restitution, which it does with 'the same effect, whether such restitution is sought 'in the nation where the sentence is pronounced, or 'in any other: it being a perpetual rule without 'any limitation that *res judicata exceptionem parit* '*perpetuam.*'

If this be the true doctrine, then also in the case of foreign judgments, the plea *res judicata*, the record existing as the defendant states, is absolute; and the plaintiff has no reply beyond the right of putting the record itself in issue.

Conclusion of earlier doctrine.

Mr. Starkie's view seems to coincide with this doctrine :— *Starkie.*

'The principle upon which a judgment is admissible at 'all is, that the point has already been decided in a suit 'between parties or their privies by some competent 'authority, which renders future litigation useless and vexa- 'tious. If this principle extends to foreign as well as domestic 'judgments, *as it plainly does*, why is it to be less operative 'in the former than in the latter case? If it does not embrace 'foreign judgments, how can they be evidence at all? By 'admitting that such judgments are evidence at all, the 'application of the principle is conceded: why then, is its 'operation to be limited as if the foreign tribunal had heard 'nothing more than an *ex parte* statement and proof?'— [Starkie—'Law of Evidence,' I. p. 273.]

Sir R. Phillimore's conclusion is 'that the exception *res* *Sir R. Phillimore.* '*judicata* ought to be in all, and is in most states, admitted

Int: Law, MDCCCCXXXV. 'as a complete bar to a second litigation upon the subject 'to be adjudicated upon,' *certain conditions being fulfilled.* The conditions, which may be set out here for convenience of reference, are somewhat similar to the pleas by which the foreign judgment may be attacked by the defendant; others coincide with the essential conditions of identity between the two suits which are indicated on page 61. The learned author and judge stands midway between the two doctrines, asserting MDCCCXLIII. that the plea of *res judicata* should be admitted as *a complete bar*, but only on certain conditions; some of which conditions coincide with the defences contended for as admissible by the opposite doctrine. The conditions are:

I. The Tribunal to be competent according to the Foreign law.

II. The Tribunal to be duly seized, or possessed of the subject of its decision:—

Its jurisdiction must be properly founded.

It may not cite one not belonging to the country, either by birth or domicil, or temporary residence, unless he has property or incurred some liability in the state.

III. The Foreigner must have been fairly heard according to the laws of the State, on an equality in every respect; including the right of appeal with a native subject.

IV. Some states add reciprocity.

This conclusion considered.

Let us consider if this conclusion is consistent with results we have already arrived at:—When an action is brought upon the foreign judgment we have ventured to assert as the true principle, that to a certain extent only, the foreign decision shall be received as absolutely binding; in the Chapter on Defences to the Action, we shall ascertain as accurately as possible, what this extent really is: but so far as we have gone already we find that our Courts have established a difference between English and Foreign decisions, when they come to be enforced; the English judgment produced by the plaintiff is synonymous with Truth; the Foreign

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judgment will be taken as true, so long as the obligation that has arisen upon it abroad is not negatived. But, when the defendant produces it, the plaintiff having brought an action on the original cause of action, if the doctrine just discussed be accurate, the full force of the maxim *res judicata pro veritate habetur* is to apply; that is, the Foreign Judgment, will be, in its effect, identical with an English Judgment under similar conditions; in other words, it will be a synonym for Truth.

The result of the doctrine stated algebraically.

The use of well-known algebraical symbols may perhaps make this clearer.

The Judgment, produced by plaintiff in an action upon it :—

an English Judgment ≡ Truth.
a Foreign Judgment = Truth, if the obligation is not negatived.

The Judgment produced by defendant :—

Foreign Judgment ≡ Truth ≡ English Judgment.

The same judgment may receive either treatment.

Now, the very same judgment may come before the Court in either way: and the result is, that if the defendant produces it as a defence to an action on the original course of action, it is absolute ; but, if the plaintiff exercises his alternative right and brings an action on the judgment, then it is not absolute ; for the defendant may negative the existence of the obligation, or excuse the performance of it.

It may be said, that in the one case, the plaintiff voluntarily submits the judgment to our Courts; whereas in the other, the defendant is obliged to appear, and only uses it as a means of self-defence ; and that for this reason, more favour should be shewn to the defendant : This indeed appears to be the ground of Chief Justice Eyre's judgment in *Phillips*

Phillips v. *Hunter*, 2 H. Bl: 402.

v. *Hunter* cited above; but the same remark applies with equal force to the case of an English judgment: indeed, with greater; for an action on an English judgment though allowed, is not looked upon with any favour: yet here, there is a fixed rule, which is applied to either case: The record, irrespective of the manner in which it comes before the Court, imports credit and verity.

An assumption for the sake of argument.

Now, for the purpose of making the doctrine of Foreign Judgments parallel with the doctrine of English Judgments; *let us assume*, that the same rules hold for recognising, as for enforcing the Foreign Judgment: The assumption however, is not quite correct, because there is a distinction between the cases of the plaintiff and the defendant: it is this; the plaintiff selected, and therefore submitted to the jurisdiction of the Foreign Tribunal; the defendant was obliged to appear before it, or suffer judgment by default: Therefore, although the defendant may be able, where judgment has gone against him by default, to negative the existence of the obligation, by proving that the Foreign Court had no jurisdiction; the plaintiff cannot do so, for he himself created the jurisdiction. The assumption must therefore be slightly modified:—the same rules hold for recognising as for enforcing a Foreign Judgment; with this exception, where it is raised by way of defence, the plaintiff cannot negative the jurisdiction of the Foreign Court.

The assumption modified.

Analogy between rules as to English and Foreign judgments

Again, let us consider what analogy exists between the rules for English and Foreign Judgments: For the English Judgment, the rule is, that it is *res judicata*, and therefore absolute: For the Foreign Judgment; the rule is, that the obligation may be negatived. The difference may

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be thus explained: All those defences, which in the case of a Foreign Judgment may be used by the defendant to negative, or excuse, are, in the case of an English Judgment, grounds for appeal, and are therefore not admitted as a defence to the action on the judgment; for, on those same grounds, if established, the Court would have set the judgment aside, or would have reversed it: But it is otherwise with a Foreign Judgment; the English Courts do not sit on appeal from the Foreign Courts, nor can they reverse the decision; therefore, as will be seen, they will not admit defences, which, as to the merits of the case, would be fit ground for appeal in the Foreign Country; but only such as are not grounds for appeal there, or, if they were, would not be entertained there.

Let us examine now, by an elementary algebraical process, whether our assumption holds good:—

Algebraical test of assumption.

There is an English Judgment:—
if produced by the plaintiff,—a certain rule obtains.
if produced by the defendant,—the same rule obtains.

There is a Foreign Judgment:—
if produced by the plaintiff,—a certain other rule obtains:
the variation between this rule and the former one being made on account of the change from an English to a Foreign Judgment:

i.e., algebraically.

The Foreign rule is to the English rule, as the Foreign Judgment is to the English Judgment.
Therefore,

if produced by the defendant,—the same rule obtains.

Stated in algebraical symbols.

This may be made very plain by the use of Algebraical Symbols.
Thus :—Let,

English Judgment = E.
Foreign Judgment = F.
rule for English Judgment = r_1
rule for Foreign Judgment = r_2
produced by plaintiff = p.
produced by defendant = d.

Now

$E \times p = r_1$
$E \times d = r_1$ or $E \times d = E \times p$.

and

$F \times p = r_2$

but $r_2 : r_1 = F : E$

$$\therefore \frac{F}{E} = \frac{r_2}{r_1} \therefore F \times d = E \times d \times \frac{r_2}{r_1}$$

$$= r_1 \cdot \frac{r_2}{r_1}$$

$$\therefore F \times d = r_2$$

or $F \times d = F \times p$.

The doctrine has been modified.

Let us take another view of the case. If this doctrine formerly existed : namely, that a Foreign Judgment, the defendant producing it, was absolutely binding on our Courts ; the plaintiff producing it, was not absolutely binding, but the existence of the obligation might be negatived by the defendant ; it has certainly undergone some modifications in recent cases—although the distinction between enforcing and recognising the judgment has not always been kept perfectly clear.—The arguments have been somewhat of this nature :—It has been held that there is not a merger of the original cause of action by reason of the judgment pronounced by the

The doctrine of non-merger.

Chapter I. Foreign Court: but that the plaintiff has his option of suing in our Courts either on the judgment, or on the original cause of action.—(This doctrine has been adopted in the preceding argument; and for the present we must assume its correctness, and postpone any discussion of it). 'Now,' says Story, 'if the original cause of action is not merged in a 'case where the judgment is in favour of the 'plaintiff, it is difficult to assert that it is merged by 'a judgment in the Foreign Court in favour of the 'defendant.' (Conflict of Laws, § 599a.) It must be noticed however, that whereas the judgment which comes before our Courts for recognition may be either in favour of the plaintiff or the defendant; a judgment for the defendant could hardly ever come here to be enforced.

Story, § 599a.

Bank of Australasia v. *Harding*. 19 L. J: C. P. 345.

In the case of the *Bank of Australasia* v. *Harding*, the defendant pleaded a judgment already recovered in the Supreme Court of New South Wales. Wilde, C.J., said:—'This judgment is 'pleaded by way of merger or extinguishment of 'the cause of action. Now, if a Court of competent 'jurisdiction has given judgment, that judgment at 'the place where it was given is conclusive against 'the parties, if not appealed against. At that place 'it must be taken as a merger or extinguishment. 'But in all the cases on the effect of a foreign 'judgment, it has been treated only as *primâ facie* 'evidence of the cause of action.—The judgment 'may be a merger in the Colony, because it is 'conclusive there; but when it is sued on in another Country, it is only *primâ facie* evidence of the debt. For these reasons, I think the plea is bad.' Now, since there is no merger, and the plaintiff coming to our Courts sues, at his option, either on the original cause of action, or on the judgment; it

Wilde, C.J.

Consequence of doctrine of non-merger: *res judicata* a bad defence.

follows, that if he choose the former alternative, the foreign judgment being in his favour, the plea *res judicata* implies there is a merger. According to this view of the case therefore, the plea is inadmissible, and the foreign judgment is no bar to the action.

Unless coupled with satisfaction.

The defendant's plea may be more than merely judgment recovered; he may plead also satisfaction of the judgment. On the authority of *Barber* v. *Lamb*, and in accordance with the most elementary principles of justice, there can be no doubt that such a defence would be good: that judgment recovered, and payment, is an extinguishment of the original cause of action: In this case then, where the plea *res judicata* is coupled with satisfaction, it is absolute—(the dictum of Keating, J., in *Barber* v. *Lamb*, as to the plaintiff's reply will be noticed when the question what may be replied is discussed: this, it may be observed, is the difficulty lying at the foundation of this enquiry).

Barber v. *Lamb*, 29 L. J: C. P. 234.

Judgment for defendant. *Story's* argument.

Let us consider lastly, if the case is in any degree altered by the fact of the judgment having been in favour of the defendant. Now, following Story's argument, judgment in the foreign Court for the plaintiff does not merge the original cause of action here: Therefore, judgment in the foreign Court for the defendant does not extinguish the original cause of action here. So, in this case also, should the plaintiff bring an action on the original cause of action, since the foreign judgment is no bar, *res judicata* cannot be pleaded.

Res judicata bad defence.

Conclusion from doctrine.

The conclusion is therefore, that, except where the judgment has been satisfied,—with regard to foreign sentences, the plea of *res judicata* has not the same effect as it has with regard to English sentences; but that the plaintiff may reply to it.

The question arises, What?

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We have seen that in the case of enforcing a foreign judgment, the principles of defence are :— to negative the existence of the obligation, or excuse the performance of it—the several defences being reserved for future discussion.

What are to be the principles of plaintiff's reply?

Now, when the defendant sets up the judgment by way of defence, What are to be the principles of reply?—Once it is conceded that a reply is to be allowed, it is difficult to understand why, *mutatis mutandis*, these same principles of defence should not again apply: and this seems to have been the view taken by Keating, J., in *Barber* v. *Lamb* above referred to :—'Our decision,' he says,' does 'not interfere with those cases which have decided 'that a foreign judgment may be examined into 'under certain circumstances. If there were facts 'which would have deprived the foreign Court of 'jurisdiction, they might have been replied.' But the principle of Chief Justice Erle's judgment in *Phillips* v. *Hunter* is, that the jurisdiction of the Court cannot be attacked by the plaintiff, because he himself has chosen the tribunal, and thus submitted to it :—'It seems to me to be analogous to 'the case where parties have referred the question 'in dispute to an arbitrator and he has made an 'award, (and the sum which he has awarded has 'been duly paid according to the award). It would 'be contrary to all principles for the party who has 'chosen such tribunal (and got what was awarded) 'to seek a better judgment in respect of the same 'matter from another tribunal.' It is suggested that the words 'and got what was awarded,' though lending strength to the principle from the facts of the particular case, may be removed without diminishing the truth of the doctrine,—Submission to the tribunal cannot be withdrawn by the party submitting.

Barber v. *Lamb.* 29 L. J: C. P. 234.

Keating, J.

Phillips v. *Hunter.* 2 H. Bl: 402.

Erle, C.J.

The principle that submission to tribunal cannot be withdrawn.

Taking the case therefore simply; if the judgment pleaded be for the defendant, we have the plaintiff by his reply, negativing the existence of the obligation (a negative one), or excusing the performance of it: if, by his reply, the plaintiff attacks the Court's jurisdiction, the defendant rejoins, a submission on the plaintiff's part to the tribunal.

A principle of reply obtained by a modification of principle of defence.

Here, then, a modification of the principle of defence, will serve as the principle of reply: (still bearing in mind that the judgment is for the defendant):—The plaintiff may by his reply, negative the existence of the obligation, or may set up an excuse for the performance of it; but may not, in so doing, attack the jurisdiction of the Court.

Judgment for defendant.

Judgment for plaintiff.

If the judgment pleaded be for the plaintiff, the process is as follows:—The plaintiff brings an action on the original cause of action, producing the foreign judgment as *primâ facie* evidence of the debt: or, the defendant produces the judgment, pleading *res judicata;* and the plaintiff replies that there is no merger of the cause of action in the judgment.

Now, up to the present time, it will be observed that we have, on authority, assumed that the original cause of action abroad is not merged in the Foreign Judgment; and that the plaintiff in this country may therefore proceed either upon that original cause of action, or upon the Foreign Judgment itself. Before going further, this doctrine needs some examination.

The doctrine of non-merger examined. Authorities against it.

First, as to the authorities against it. We have seen that to admit the plea *res judicata*, implies that there is a merger of the original cause of action in the judgment. Those judges, therefore, who have held this plea admissible, have also by implication held, that there is a merger.

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We have already cited Eyre, C.J., in *Phillips* v. *Hunter*; Lord Campbell, C.J., with Lord Lyndhurst, L.C., in *Ricardo* v. *Garcias*, and others: We have now to cite authorities in favour of a slight modification of the same principle:—that *res judicata* is admissible, that is, that the foreign judgment is conclusive in England, if it is (proved to be) conclusive in the country where it was pronounced. Thus Bayley and Holroyd, J.J., in *Plummer* v. *Woodburne*:—'The difficulty we have had is, that 'we are ignorant of the law of S. Cristopher, 'whether a judgment in that Island would be 'conclusive or not. It would be hard to hold that 'that which is not conclusive there should be con-'clusive here. The plea should state that by the 'S. Cristopher law such a decision would be final 'and conclusive there.' With this Erle, C.J., agrees, in *Frayes* v. *Worms*:—'There is no allegation here 'that the judgment in the Court of San Francisco, 'assuming it to be in a proceeding between the same parties, was final and conclusive.' And Lord Tenterden, C.J., in *Becquet* v. *M'Carthy* is somewhat to the same effect:—'The French law prevailed in 'Mauritius then: and the French Court there was 'much more competent to decide questions arising 'on that law than we can be.' (We see the full force of this judgment where the original cause of action is one depending on the Foreign law.)

Phillips v. *Hunter*. 2 H. Bl: 402.

Ricardo v. *Garcias*. 12 Cl: & Fin: 368.

A slight modification of the doctrine of *res judicata*.

Plummer v. *Woodburne*. 4 B. & C. 625.

Bayley, J. *Holroyd, J.*

Frayes v. *Worms*. 10 C. B: N. S. 149.

Erle, C.J.

Becquet v. *M'Carthy*. 2 B. & Ad: 951.

Ld: Tenterden, C.J.

But on the other hand, there is this statement in Smith's Leading Cases, in the able note to the *Duchess of Kingston's Case*—*p.* 813—'Foreign judg-'ments certainly do not occasion a merger of the 'original ground of action.' The cases cited in support, are the following:—*Smith* v. *Nicolls*: where, to an action of trover the defendant pleaded, that he being in the jurisdiction of the Vice-

Authorities in favour of it as given in Smith's Leading Cases.

Duchess of Kingston's Case. 2 Sm: L. C. 813.

Smith v. *Nicolls*. 7 Sc: 147.

Admiralty Court of Sierra Leone, the Plaintiff recovered a judgment against him in that Court for the same cause. The plea was held ill: and Tindal, C.J., after giving as the ground on which a judgment recovered in an English Court bars the plaintiff from any further action, to be, that the original nature of the debt or damage is changed, and that there comes into existence a higher remedy; continues:—'This Vice-Admiralty Court 'in a Colony is not a Court of Record. If the 'judgment has not altered the nature of the rights 'between the parties, why is the plaintiff to be 'deprived of the right which every subject has to 'sue in the Courts of this country for the debt or 'damage. The original ground of action is not 'extinguished and merged between the parties. 'When it becomes necessary to enforce foreign 'judgments in this country, the plaintiff has his 'option either to resort to the original ground of 'action, or [sue] on the judgment recovered.'

Tindal, C.J.

Note on *Smith* v. *Nicolls.*

(Although the last sentence points to the existence of such a general doctrine, the judgment seems to proceed on the ground that the decision before the Court was of a foreign Court of inferior jurisdiction, and therefore not entitled to respect.)

Vaughan, J.

And in the same case, Vaughan, J.:—'In order 'to bar an action here, the judgment in the Colonial 'Court must be final and conclusive between the 'parties: which *Hall* v. *Obder* and *Plummer* v. *Woodburne* shew clearly it is not.'

[*Query*]

Plummer v. Woodburne. 4 B. & C. 625.

Hall v. *Obder.* 11 East, 118.

Ld. Ellenborough, C.J.

Hall v. *Obder*:—'Foreign Judgments strictly 'speaking are not, to be considered on the same 'footing as judgments in our own Courts of Record; 'they are but evidence of the debt, and do not bar or 'stay an action on simple contract.' (Lord Ellenborough, C.J.)

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Bank of Australasia v. *Harding*:—During the argument Wilde, C.J., expressed a doubt whether it followed 'that when the original cause of action 'is merged, that must be treated as conclusive 'everywhere,' and in his judgment he said :—'The 'judgment may be a merger in the Colony, because 'it is conclusive there : but when sued on in another 'country, it is only *primâ facie* evidence of the 'debt.'—and

Bank of Australasia v. *Harding*. 19 L. J: C. P. 345.

Wilde, C.J.

Creswell, J. :—'There is nothing to prove that the 'original contract is extinguished or merged, or 'any higher remedy given, or that the right of 'action is taken away.'

Cresswell, J.

Talfourd, J., also concurred; but Maule, J., doubted.

Talfourd, J. *Maule, J.*

Bank of Australasia v. *Nias*:—

Bank of Australasia v. *Nias*. 20 L. J: Q. B. 284.

The judgment of Lord Campbell, C.J., hardly supports the proposition.

Kelsall v. *Marshall*:—Cresswell and Crowder, J.J., held that they were bound by the previous cases.

Kelsall v. *Marshall*. 1 C. B: N. S. 266.

Cresswell and Crowder, JJ.

Castrique v. *Behrens*:—

Castrique v. *Behrens*. 30 L. J: Q. B. 163.

It is doubtful whether this case supports the proposition.

Westlake supports the doctrine :—'The maxim '*transit in rem judicatam* does not in England apply 'to foreign judgments, so that the plaintiff has here 'the option of suing on the original cause.' (International Law, § 392.)

Westlake.

Ellis v. *M'Henry*. L. R.: 6 C. P. 228.

And in *Ellis* v. *M'Henry*, the plaintiff indeed brought two actions, one on a Canadian judgment, and one on the original cause of action.

In illustration of the doubt and difficulty surrounding this point, two passages from Story's 'Conflict of Laws' may be quoted—§ 599a—'The 'present well-established doctrine in England is,

Two conflicting passages from *Story*, § 599a.

'that a foreign judgment in favour of the plaintiff 'is not a bar to a suit in England upon the original 'cause of action'—and § 618h—'It may now be 'regarded as fully established in England, that the 'contract resulting from a foreign judgment is 'equally conclusive in its force and operation with 'that implied in any domestic judgment.' The foot-note to the former paragraph however, seems to throw some doubt upon the proposition therein enunciated.

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Difficulty suggested as arising from the doctrine.

Now, there is this difficulty:

First: If the foreign judgment is *primâ facie* evidence of the debt: What may the defendant plead in answer to it?

Secondly: If the defendant has produced the judgment: What may he rejoin to the plaintiff's reply that there is no merger?

In other words: What is the effect of this doctrine of non-merger of the original cause of action in the foreign judgment?

The answers to the difficulty are unsatisfactory.

And *first:* If the judgment is only *primâ facie* evidence of the debt, that is, of the original cause of action, and not conclusive; it must be open to the defendant to meet it by any counter-evidence negativing the existence of that original cause of action (Blackburn, J.—*Godard* v. *Gray.*) The foreign judgment becomes then merely a part of the evidence in support of the plaintiff's claim, and has no more respect paid to it than to any other piece of *primâ facie* evidence produced; the defendant's case may take any form he pleases.

Godard v. *Gray.* L. R. 6. Q. B. 139.

secondly: There being no merger of the original cause of action, the same result seems to follow, if the defendant pleads the judgment already re-

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covered; in so doing he assists the plaintiff's case, by producing *primâ facie* evidence (the judgment being in favour of the plaintiff) in support of it; and in this case the foreign judgment has no greater respect paid to it than before.

An apparent confusion between action on judgment and on original cause.

At this stage we may notice a confusion that seems to have arisen in many cases: An action on a judgment has been confounded with an action on the original cause of action; and the principle which we have been discussing, that in this latter action, the judgment is only *primâ facie* evidence of the debt when produced by the plaintiff, has been applied to the former action, that on the judgment itself: Thus in *Houlditch* v. *Marquess of Donegall,* in which case proceedings were taken in the Court of Chancery in Ireland to obtain the full benefit of a decree of the Court of Chancery in England; Lord Brougham, L.C., said:—'The 'language of the opinions on one side has been so 'strong, that we are not warranted in calling it 'merely the inclination of our lawyers: it is their 'decision that in this country a foreign judgment 'is only *primâ facie,* not conclusive evidence of a 'debt.'

Houlditch v. *Donegall.* 2 Cl: & Fin: 470.

Lord Brougham, L.C.

Result of this confusion.

And the result of this confusion is, that in suing on a foreign judgment, the plaintiff is supposed to have elected to treat it as a debt here: the two causes of action, the judgment and the original debt, being thus fused.

But if the general doctrine be as we have stated it in the first part of this Chapter, such an election cannot for one moment be supposed to take place.

Authorities in favour of the doc-

The principle however, has been very frequently acted upon: it was laid down distinctly in *Sinclair* v. *Fraser*: and this case was followed in *Walker* v.

Sinclair v. *Fraser.* 1 Dougl: 5.

trine of *primâ facie* evidence.

Witter, *Robertson* v. *Struth*, and finally in the *Bank of Australasia* v. *Harding*:—'The judgment 'has been always treated only as *primâ facie* 'evidence of the cause of action.'

Walker v. *Witter*. 1 Dougl: 1. *Robertson* v. *Struth*. 5 Q. B. 941. *Bank of Australasia* v. *Harding*. 19 L. J: C. P. 945.

The doctrine upset by *Blackburn, J.*

The proposition was as we have seen, completely demolished by Lord Blackburn—if the proposition is good, the defendant may meet it by any counter-evidence negativing the existence of the debt; a doctrine which no Judge has ever sanctioned.

What is the judgment evidence of?

This leads us to the enquiry what the judgment is evidence of. In accordance with the theory we have advanced, we venture to suggest that it is the *primâ facie* evidence of the existence of the foreign obligation and sanction which is requisite to establish to the satisfaction of the English Courts the existence of the *bare obligation*, which was conceived as having arisen in this country. For it is essential to prove its existence, before it can be clothed with the International Auxiliary Sanction resident in the English Sovereign Authority:—Being *primâ facie* evidence of the existence of the foreign obligation, it is open to the defendant to meet it by any counter-evidence negativing the existence of this obligation.

Bigelow.

Mr: Bigelow has thus graphically described the variations that the theory has undergone. (Law of Estoppel: Boston, 1872—p. 185):—

"The Courts for many years fluctuated in their rulings 'concerning the effect to be given to the judgments of 'tribunals of foreign countries, at one time considering 'them as *primâ facie* evidence only, and liable to be over-'turned by countervailing proof; now advancing and hold-'ing them conclusive of the matters adjudicated, and 'again receding to the former position; until finally, when 'the precise point presented itself for earnest consideration, 'they declared in favour of the conclusiveness of these judg-'ments, on solemn deliberation. It was finally settled in

'England considerably earlier than in the United States' 'and now, the Courts have not completely advanced.'

The case of mutual damage considered separately: following *Westlake.* § 394.

There is one case where a foreign judgment is pleaded as *res judicata*, which, following Mr. Westlake, may be considered separately: mutual damage; to it, the principle of the maxim applies in all its force, that one adjudication upon the subject of the dispute by a Court competent to adjudicate should be sufficient, and should conclude all further enquiries:—'If there was damage incurred by both parties, through an accident which 'each charges to have happened by the negligence 'of the other; the judgment of a foreign tribunal 'is conclusive so as to prevent the person on whom 'it threw the blame, though the defendant there, 'from suing here on the same facts.' (Westlake, International Law, § 394.) The case relied on in support of this proposition is the *General Steam Navigation Co.* v. *Guillon;* but the learned author adds: 'This doctrine not being directly in point, it 'is not positively advanced.'

General Navigation Co. v. *Guillon.* 13 L. J: Ex: 168.

There had been a collision upon the high seas: the defendant alleged that the Court at Havre, before which the plaintiffs appeared to defend, adjudged the negligence to have been on the part of the Navigation Company; and that there was no negligence on the part of the defendants: that by the law of France this judgment was an absolute and final bar to an action for the same cause by the then defendants, the present plaintiffs. The plea was held bad *in form*, for want of a proper commencement and conclusion by way of estoppel: but it was also held bad *in substance*, for not stating that the plaintiffs were French Subjects, resiant or even present in France when the suit began, so as to be

bound by reason of allegiance or domicil, or temporary presence, by the judgment of the French Court. (Parke, B.):—they did not select the tribunal and sue as plaintiffs: in all of these cases the defence would have been good—(the latter case would have arisen, if the French judgment had been adverse to the present defendants). Thus far the judgment agrees with the principles already defined: it proceeds:—'They were mere strangers, 'who had put forward the negligence of the de- 'fendant as an answer, in an adverse suit in a foreign 'country, whose laws they were under no obligation 'to obey.' This seems to be in favour of a negative answer to the quære suggested in the marginal note. (13 Law Journal, Ex: p. 169.) '*And, if* '*it contained such averments; quære, whether it* '*would have been a bar to the action.*'

Parke, B.

The point therefore appears to be directly decided: and in such a manner as not to support Mr. Westlake's proposition. In the absence of any other authority, we cannot venture to concur with the learned author, however good the proposition appears to be, beyond saying, that if the principles upon which the conclusions in this Chapter are based, are correct; this case falls within the direct application of them.

The results at which we have arrived in the foregoing discussions may now be collected: the various doctrines being stated, and the effect, whether anomalous or otherwise, being pointed out.

The earlier absolute doctrine.

I. The doctrine, that *res judicata* may be pleaded as well for a Foreign as for an English judgment, and that it is absolutely conclusive.

anomaly:—that the same judgment may receive different interpretations, depending on which party produces it.

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II. A modification of this doctrine ; the principle of the plaintiff's reply being assimilated to that of the defendant's defence ; with an exception, as to the Court's jurisdiction. The suggested modification of the doctrine.

result :—An uniform recognition accorded to Foreign judgments, whether coming before the English Courts to be enforced, or being pleaded in bar to an action.

III. The doctrine, that there is no merger of the cause of action in the foreign judgment : The later doctrines.

that the plaintiff may at his option sue on the judgment or on the original cause of action : No merger. Action on original cause allowed.

that *res judicata* therefore cannot be pleaded. *Res judicata* not admissible.

a. but that it may be so pleaded if payment or satisfaction of the judgment be proved.

β. Judgment being for the Defendant :

no merger for the Plaintiff, therefore, no merger for the Defendant.

Plaintiff's reply may negative the existence of the obligation, or excuse the performance of it :

result :—uniformity as in II. between the principles of enforcing and recognising.

γ Judgment being for the Plaintiff :

(*a*) and produced by him in support of his claim :

only *primâ facie* evidence of original cause of action ;

therefore defendant may meet it by any evidence.

(*b*) produced by defendant to rebut the claim :

no merger: but *primâ facie* evidence in favour of plaintiff.

therefore defendant may produce any other evidence; and plaintiff may do the same.

anomaly:—as in I.: but much stronger: the judgment coming to be enforced, in a great measure conclusive: but the plaintiff exercising his option of suing on the original cause of action, the same judgment of hardly any effect whatever.

This last anomaly appears to be the inevitable result of the doctrine of non-merger. Without assuming to weigh the authorities for and against this theory, some method might be adopted in order to avoid its extreme consequences: In fact, some such method must have been adopted by the judges who have established the doctrine, in order to receive as they did, the foreign judgment as having more weight than the theory would really ascribe to it:—For the English Court has before it an adjudication upon the very same matter by a competent foreign tribunal: although there is no merger of the original cause of action, although therefore the foreign judgment is no bar to the action on that original cause of action, and although the judgment is only *primâ facie* evidence of that original cause of action; yet it might still be possible for the Court to say that it would waive the ultimate result, and by virtue of the Comity of Nations, which has already been taken as a guiding principle of our Courts when foreign judgments come before them, would to some extent, receive as final the decision of the Foreign Court upon the subject: being guided, as to the extent of finality to be accorded, by principles of general applica-

Process by which the anomaly resulting from non-merger might be (or has been) avoided.

It appears in fact that judges, although holding the judgment to be only *primâ facie* evidence, yet do accord to

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tion. Thus, where the judgment is produced by the defendant [II $\gamma(b)$]: The English Court, supposing the Foreign Court to have acted rightly, would not inquire into the merits of the case:—The plaintiff having selected the Foreign Court, would be considered bound by his submission, and not allowed to raise in his reply anything by which the jurisdiction of that Court might be attacked: And, where the judgment is produced by the plaintiff [III. $\gamma(a)$], the judgment would be received, not as mere *primâ facie* evidence, but as *primâ facie* evidence after the adjudication *as to the merits* had been received: and thus the defendant would not be allowed to plead any defence upon the merits; but, since he was compelled to submit to the Foreign Court, he would be allowed to attack the jurisdiction of the Court; and also to plead by way of defence, the same things that the plaintiff was permitted to plead in reply.

it more weight.

NOTE, The authorities in favour of non-merger and *primâ facie* evidence, are nearly all in favour also of the doctrine of Comity.

All or any of such general principles might be admitted to mitigate the extreme rigour of the doctrines of non-merger, *primâ facie* evidence, and option of suing on the original cause of action. Taken singly, we have a nearer approach to the uniform practice advocated in this chapter; Taken together, the result, although an illogical consequence from the doctrines, coincides entirely with this uniform practice:—Further; where the judgment is for the defendant [III. β], practice and theory coincide to produce the same result: and this result, this uniform practice, has been also arrived at by a strict mathematical process, as a logical consequence from received data.

General summary.

Considering the advantage of assimilating the doctrine of recognition to the doctrine of enforcing, it is with some degree of confidence that this modi-

fication of the old strict doctrine is put forward, as the one on which the Courts may possibly act in the future: but it is also with a greater degree of diffidence that the attempt to reconcile the authorities has been made, considering the conflicting opinions expressed in them.

Injunctions to restrain proceedings in Foreign Courts, and *Lis alibi pendens*.

Lis alibi pendens.

The plea *lis alibi pendens*, being closely allied to the plea *res judicata*, must here be considered: The point arises when two suits for the same cause of action are being prosecuted between the same parties simultaneously in the Courts of two countries, both having jurisdiction over the subject-matter of the action. With regard to *lis alibi pendens*, Mr. Westlake's conclusion is, that it was formerly a bad plea, but that now it is considered good. There is indeed some divergence in the authorities as to the full effect of the plea, but the result which has been arrived at from the consideration of them will be found to be grounded on the same principle as *res judicata*, namely, that of supposing the Courts of another country to act well and justly, and a willingness on the part of English Courts to abide by their decisions.

Westlake.

Injunction.

Intimately connected with *lis alibi pendens* is the subject of Injunctions, granted by the English Courts to restrain proceedings; or rather to restrain a certain person from proceeding in a Foreign Court, in which a suit is being carried on concurrently with the English suit, both Courts, as before, having jurisdiction over the subject of the action.

Division of subject for discussion.

The two points arising from the same cause, it will be convenient to consider them together; and for the greater convenience of discussion, to divide

Chapter I. the subject into cases where—

(*a.*) the English suit is commenced first:

(*β.*) the Foreign suit is commenced first.

English suit commenced first.

(*a.*) The English suit having been commenced, we must ascertain what power the English Courts have of preventing either party from commencing a suit for the same cause in another country; or of checking one already proceeding but commenced before the English suit:—'It is evident that the 'English Court has no jurisdiction over a Foreign 'Court which happens to have jurisdiction upon the 'matter of the suit.' (Sir John Leach, V.-C., *Bushby* v. *Munday*).

Leach, V.-C.

Bushby v. *Munday.* 5 Mad: 297.

Power of English Court to restrain foreign suit.

The foundation of the power must therefore be that the party is within the Court's jurisdiction, not constructively, but absolutely:—'There is no 'doubt as to the power of the Court of Chancery to 'restrain persons within its jurisdiction from insti- 'tuting or prosecuting suits in Foreign Courts— 'acting *in personam*.' (Lord Cranworth, L.C., *Carron Iron Co*: v. *Maclaren*):—'Where the parties 'are in England, the Court has full authority to act 'upon them personally with respect to the subject 'of the suit as the ends of justice require: and 'with that view, to order them to take, or to omit 'to take, any steps or proceedings in any other 'Court of Justice, whether in this country or in a 'foreign country. If a defendant who is ordered 'by this Court to discontinue a proceeding he has 'commenced against the plaintiff in some other 'Court of Justice, either in this country or abroad, 'thinks fit to disobey that order, and to prosecute 'such proceeding, this Court does not pretend to 'any interference with the other Court, it acts upon 'the defendant by punishment for contempt.' (Sir J. Leach, V.-C., *Bushby* v. *Munday*)..

Ld: Cranworth.

Leach, V.-C.

Carron Co: v. *Maclaren.* 24 L. J: Ch: 620.

Chapter

Following the judgment of Lord Cranworth, L.C., in the *Carron Iron Co*: v. *Maclaren*, we may proceed to consider a series of propositions:

Carron Co: v. *Maclaren*. 24 L. J: Ch: 620.

First proposition. Vexatious harassing.

i. 'Where, pending litigation here, in which complete relief may be had, a party to the suit institutes 'proceedings abroad; Chancery in general con-'siders that act as a vexatious harassing of the oppo-'site party, and restrains the foreign proceedings.'

Beckford v. *Kemble*. 1 Sim: & S. 7.

For example, in *Beckford* v. *Kemble*, an injunction was granted to restrain the mortgagees of a West India estate from proceeding on a bill of foreclosure in the Colonial Court of Jamaica, filed after a decree made in England on a bill to redeem, which directed an inquiry to ascertain the amount of the mortgage debt: all the parties being in this country. And in *Harrison* v. *Gurney*, where trustees for creditors after a decree for execution of trusts, were restrained from proceeding in the Irish Court of Chancery for the same objects.

Harrison v. *Gurney*. 2 J. & W. 563.

This was followed in *Beauchamp* v. *Marquis of Huntley* and *Clarke* v. *Earl of Ormonde*.

Beauchamp v. *Huntley*. *Clarke* v. *Ormonde*, Jac: 546.

Two points are to be considered here;—Jurisdiction; and Identity of suits.

Constructive jurisdiction of English Court over party against whom injunction asked.

The case of constructive jurisdiction was elaborately argued in the *Carron Iron Co*: v. *Maclaren*. The company had offices both in England and Scotland; they had also agents in England. In the House of Lords, Lords Cottenham and Brougham held that this did not bring the Company within the jurisdiction of the English Court, so as to compel them to obey an injunction; that the injunction to stay the Scotch proceedings could not be granted, because the Court could not interfere with a foreign creditor, suing for a debt in the Courts of his own country. Lord St: Leonards

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however dissented, and expressed his opinion that a submission to the jurisdiction was sufficient to enable the Court to issue an injunction.

Identity of suits.

As to the identity of suits, the subject will be found discussed on page 61; some cases however bearing directly on the subject of injunctions must be considered.

The identity of the suits is frequently expressed by the words 'in which complete relief may be had,' as in Lord Cranworth's proposition.

Booth v. *Leycester.* 1 Keen 579.

In *Booth* v. *Leycester*, Lord Langdale, M.R., implied that an injunction would be granted in England in cases where the English adjudication could be pleaded as *res judicata* in the foreign Court.

Bushby v. *Munday.* 5 Mad: 297.

In *Bushby* v. *Munday*, there was a bill in England to set aside a bond given for a gaming debt: in Scotland there was a bill on the bond: Although the ultimate consequence was not the same, for the English suit involved the cancellation of the bond, the same question had to be considered—whether by the law of England money could be recovered on the bond.

The Lanarkshire. 2 Spinks, 189.

In the case of *The Lanarkshire*, the men commenced an action for wages against the ship in England, and also one against the master for the same wages in Canada: Although one action was *in rem*, and the other *in personam*, yet the same question was involved in both, the responsibility of the owner. (This is somewhat at variance with the decision in the case of *The Bold Buccleugh—Harmer* v. *Bell*—that an action *in rem* could not be pleaded to an action *in personam*.)

The Bold Buccleugh —Harmer v. *Bell.* 7 Mo: P. C. 267.

Duprey v. *Veret.* L. R. 1 P. & M. 583.

In *Duprey* v. *Veret* the plaintiff had propounded the will of the deceased who was domiciled in France, where proceedings had been instituted to try the validity of the will in dispute. Sir J. P.

Wilde refused to suspend the English action, merely 'to allow a decision to be given in another 'on perhaps a totally different question.'

Second proposition. Yet terms may be imposed favourable to party suing.

ii. 'Even though no decree obtained here, yet if 'the suit instituted abroad appears ill calculated to 'answer the ends of justice, Chancery has restrained 'the foreign action, imposing however terms which 'it has considered reasonable for protecting the 'party who was suing abroad.'

Thus in *Bushby* v. *Munday*, although Sir John Leach, V.-C., determined that the plaintiff was not to be further harassed by proceedings in Scotland, he continued :—'But one effect of the Scotch suit, 'supposing it decided that the money might be 'recovered on the bond, may be the preferable lien 'by it on land in Scotland. The plaintiff must 'submit to such steps in Scotland either by judg-'ment or otherwise, as will secure the benefit of 'that priority, subject always to the future direc-'tion of this Court.'

Bushby v. *Munday*. 5 Mad: 297.

Leach, V.-C.

Example of form of order.

In *Beckford* v. *Kemble*, the order made was—'The 'plaintiff, by her counsel, undertaking to consent 'to any order to be made in the suit in Jamaica, 'which this Court shall at any time think reasonable.'

Beckford v. *Kemble*. 1 Sim: & S. 7.

And in *Wells* v. *Lord Antrim* the Lord Chancellor reserved power to give directions for plaintiff to proceed in this country, in case the defendants in Ireland should make it impracticable for him to proceed in the Irish suit.

Wells v. *Antrim*. cit: 3 Atk: 588.

Ld: Cottenham.

And again Lord Cottenham, L.C., in *Wedderburn* v. *Wedderburn* :—'The general rule precludes 'parties from proceeding in any other Court for 'the same purpose for which they are proceeding

Wedderburn v. *Wedderburn*. 4 My: & Cr: 585.

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'in this Court, whether the other proceedings are 'taken in this or in any other country: And if the 'party conceives there are circumstances in his case 'which constitute an exception to the rule, I think 'his proper course is, not to take proceedings in 'another country of his own authority, but to 'apply to this Court for permission to take such 'proceedings.' The plaintiffs were allowed to adopt such proceedings as would ensure them the means of satisfying what should be found to be the amount due to them.

'These two propositions proceed on convenience 'in order to prevent litigation, which the Court has 'considered either unnecessary, and therefore vexa- 'tious, or else ill adapted to secure complete 'justice.' Convenience.

iii. 'Even if there is no question as to necessity, 'or as to the effect of the suit, still if the party in 'the jurisdiction of the Court is instituting proceed- 'ings in a foreign Court; the institution of which 'is contrary to equity and good conscience, it will 'restrain.' Third proposition. Second suit contrary to equity.

Portarlington v. *Soulby.* 3 My: & K. 104. *Penn* v. *Baltimore.* 1 Ves: Sen: 444. *Toller* v. *Carteret.* 2 Vern: 494.

In the case of *Lord Portarlington* v. *Soulby*, Lord Brougham, L.C., thus reviewed the power of the Court to grant an injunction:—'If, 'as in *Penn* v. *Lord Baltimore* the Court can 'decree the performance of an agreement touching 'the boundary of a province in North America; 'or, as in *Toller* v. *Carteret*, can foreclose mortgage 'in the Isle of Sark; it can, in precisely the same 'manner restrain the party being within the limits 'of its jurisdiction from doing anything abroad, 'whether the thing forbidden be a conveyance or *Ld: Brougham.*

'other act *in pais*, or the instituting or prosecution 'of an action in a foreign Court.'

The earliest case is *Lowe* v. *Baker;* but there Lord Clarendon after advising with the other Judges, refused an injunction to Leghorn, supposing he had no authority to grant it: 'but *quære*'—the report adds—'for all the bar was of another opinion.' The case however has never been followed:—In *Campbell* v. *Houlditch*, Lord Eldon restrained the defendant from further proceeding in an action in Scotland.

Lowe v. *Baker.* 1 Ch: Ca: 67.

Campbell v. *Houlditch.* cit: 3 My: & K. 108.

Result of the three propositions.

The result of these propositions is, that 'if the 'circumstances of the case are such as would make 'it the duty of one Court here, to restrain a party 'from instituting proceedings in another Court here, 'they will also warrant it in imposing on him a 'similar restraint with regard to proceedings in a 'foreign Court.'

Fourth proposition. Not the duty, but in the discretion of the Court.

iv. 'But though the authorities justify such a 'course, yet they will not make it the duty of the 'Court so to act, if from any cause, it appears 'likely to be more conducive to substantial justice 'that the foreign proceedings should be left to take 'their course.'

Thus in *Jones* v. *Geddes*, an injunction which had been granted on a suggestion of fraud was dissolved, on the ground that, although the remedy afforded here in the case of fraud, is more effectual and complete than in the Scotch Courts, the question between the parties might on the whole, be more conveniently litigated, and with more conclusive result there than here:

Jones v. *Geddes.* 1 Ph: 724.

cf: note to *Kennedy* v. *Cassilis* (p. 323) from *Ld: Nottingham's MSS:*

and similarly in *Kennedy* v. *Earl Cassilis.*

Kennedy v *Cassilis,* 2 Swanst: 313.

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(β.) Where the English suit has been commenced after the Foreign suit;— Foreign suit commenced first— *lis alibi pendens.*

There is one direct authority against any effect being given to the plea *lis alibi pendens.* *Cox* v. *Mitchell*—The judgment of Erle, C.J., sums up all that can be advanced against the validity of the plea:—'Although there may be some hardship in 'having proceedings pending in the two countries 'at the same time, I think we are bound so to 'enforce the law as to enable the plaintiff to obtain 'satisfaction of his debt. There would be great 'danger in interfering to prevent a man from being 'sued in this country, when he may have left his 'own for the very purpose of avoiding the con-'sequence of a suit against him there.' On the other hand from *Pieters* v. *Thompson,* Lord Tenterden's judgment in *Guinness* v. *Carroll,* and the more recent decision of Sir R. Phillimore in the case of *The Mali Ivo,* it would appear that the plea is good, not absolutely to stop the English proceedings, but to induce the Court to suspend them, or put the party to his election.

Cox v. *Mitchell.* 29 L. J: C. P. 33. *Erle, C.J.*

Pieters v. *Thompson.* Coop: 294. *Guinness* v. *Carroll.* 1 B. & Ad: 459. *The Mali Ivo.* L. R. 2 Adm: 356. Decisions as to effect of plea.

Ostell v. *Lepage,* often regarded as a leading authority on the subject, does not go farther than establishing, that the plea is certainly bad if the suits are not identical: (a decree for account, where the account is not taken, is equivalent to an action pending). The effect of Lord Cranworth's judgment in this case, and of Lord Camden's in *Bayley* v. *Edwards,* seemed to be, that if the foreign decision could be pleaded in bar to the English suit, the plea would be good, but to what extent does not clearly appear.

Ostell v. *Lepage.* 2 De G. M. & G. 892 (on app:) 5 De G. & S. 95. *Bayley* v. *Edwards.* 3 Swanst: 703. *Imlay* v. *Ellefson.* 2 East. 453. *Naylor* v. *Eagar.* 7 Y. & J. 90.

We have here the same consideration as before— the identity of the suits: and of this the cases of *Imlay* v. *Ellefson* and *Naylor* v. *Eagar* are examples. Identity of suits.

Convenience.

Convenience too, will as before, govern the Court in its determination: thus in *Elliott* v. *Lord Minto*, questions respecting realty in Scotland were raised: and it appearing that a suit and cross suit had been already commenced in Scotland, the Vice-Chancellor ordered the case to stand over till the determination there:—and similarly in *Venning* v. *Loyd*.

Elliott v. *Minto*. 6 Mad: 16.

Venning v. *Loyd*. 1 De G. F. & J. 193.

English Court will assist Foreign Court.

The English Court however will go further, it will in some measure assist the Foreign Court in arriving at its decision: thus in *Wilson* v. *Ferrand*, the defendants moved to stay all proceedings pending a French suit in which the construction of the contract would be decided: this seemed a reasonable application, but Malins, V.-C., refused it, because it was apparent that it was made with a view of avoiding certain interrogatories which had been administered in the English suit. To the same effect is *Wharton* v. *May*.

Wilson v. *Ferrand*. L. R. 13 Eq: 362.

Wharton v. *May*. 5 Ves: 71.

But whether, there not being concurrent suits, the English Court will entertain a bill for discovery in aid of the defence to a suit in a Foreign Court appears doubtful.

See *Bent* v. *Young* and *Crowe* v. *Del Rio* cited therein.

Bent v. *Young*. 9 Sim: 180.

19 & 20 Vic: c. 113.

The Statute 19 & 20 Vic: c. 113, empowers the English Courts to assist Foreign Tribunals desirous of obtaining testimony in relation to civil and commercial matters pending abroad, and provides for taking the evidence required in her Majesty's dominions, when an application is made to them for this purpose.

Crowe v. *Del Rio*. cit: 9 Sim: 185.

General result as to injunctions

We may gather from the cases therefore that if the defendant is harassed by two actions for the

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same cause in different countries, some assistance will be afforded to him by the English Courts, *proceeding equitably;* restraining the continuance of the suit last commenced, if it appears to be merely vexatious: and *its alibi pendens.*

proceeding on the ground of convenience; suspending the continuance of either suit, according as to which Court is less likely to arrive at a correct decision upon the case:

and in cases, where it appears altogether immaterial in what Court the plaintiff should obtain redress, (as in *The Mali Ivo*), waiving its own authority of deciding as to the greater competency of one forum over another, and putting the plaintiff to his election as to which suit he will continue.

The Mali Ivo. L. R. 2 Adm: 356.

Further, 'if the rights of the parties have been 'fully determined by the foreign Court, but have 'not yet been satisfied, the English Chancery will 'not interfere to enforce them, while the parties 'are still before the foreign Court, and there is 'no defect in power in that forum to secure the pro- 'perty out of which the satisfaction must be made: 'though otherwise a bill will be entertained for the 'purpose of securing the property pending the liti- 'gation abroad.' (*Cruikshank* v. *Robarts.*) *Westlake.*

Cruikshank v. *Robarts.* 6 Mad: 104.

The Court will also grant an injunction following a decision of a Foreign Court. Injunction following foreign decision.

Blad v. *Bamfield.* 3 Swanst: 604.

Thus in *Blad* v. *Bamfield*, a perpetual injunction was granted to stay proceedings against a Dane for the seizure of property of English subjects in Iceland, the seizure having been sanctioned by the Danish Courts.

We must notice lastly that in certain cases an application for the injunction to restrain one of two concurrent suits by persons, parties only to one of Application for injunction by persons

parties in only one of two concurrent suits.

the suits, will be entertained:—thus in the *Transatlantic Co*: v. *Pietroni*; the plaintiffs were shipowners, on whose behalf the defendant had effected policies as their brokers: The Company had instituted proceedings in a competent Court at Genoa against the defendant for an account, to which he had appeared. Before final decree in Genoa, the defendant commenced actions in England against the insurers, upon one of the policies which had resulted in a loss. Wood, V.-C., held that it was competent for the plaintiff Company to file a bill to restrain the action, and to have a receiver of the policy moneys appointed pending the foreign litigation:—'The defendant is seeking to get possession 'of moneys which will belong to the plaintiffs sub-'ject to any lien which he may have if the balance 'of account should be in his favour.'

Transatlantic Co: v. *Pietroni*. Johns: 604.

Injunction to next of kin having obtained administration, by parties to foreign suit to ascertain the other next of kin. *Wood, V.-C.*

A similar case would arise if one of the next of kin of a foreigner were to obtain administration here, pending proceedings abroad to ascertain who the other next of kin were. In such a case there might be a bill to restrain him from any dealing with the property until the foreign Court had decided who were next of kin. (Wood, V.-C.)

The following extracts from the Judgments in the first Division of the Court of Session in *Young* v. *Barclay*, indicate the accordance between the Scotch and English procedure.

Young v. *Barclay*. 8 Bell & Mur: N. S. 774.

Ld: Jeffrey.

Lord Jeffrey:—'In England these cases are of frequent 'occurrence: With respect to the plea of *lis alibi*, I am not 'satisfied that it is inapplicable even with regard to proceed-'ings in a foreign Court. But supposing it is not technically 'and strictly applicable, as between two suits in different 'countries, yet here there are grounds of justice and expediency 'sufficient to satisfy me that we pronounce a wholesome 'judgment in granting interdict. (The domicil was mixed 'Canadian and Scotch, but the most important parol evi-'dence was obtainable in Scotland.) Even if the decree we

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'pronounce shall not have the full force of *res judicata*, 'but be examinable in Canada, after we have pronounced 'it, it must just be examined. In the meantime, let parties 'proceed regularly here until our decree is obtained, and let 'them abstain from insisting simultaneously in twofold pro- 'cedure. We do our duty in interdicting double procedure '*ad interim*, and thereby preventing the immediate emer- 'gence of an unjust and oppressive course of action; and 'when our decree, as ultimately pronounced, shall be carried 'to Canada, it will there receive the full effect due to it, in 'any proceedings which may there take place.' Lords Mackenzie and Fullerton expressed the same views.

Lord President Boyle :—'The issue was fully and fairly 'joined in the Court selected by the pursuers of the declar- 'ator themselves, affecting the rights to the whole moveable 'succession wherever situated. After all this, the pursuers 'commence proceedings in the Canadian Courts, raising 'the same question as to domicil for the purpose of taking 'up that part of the moveable succession situated in Canada. 'I apprehend, in these circumstances the defenders were 'entitled to apply to this Court to restrain the pursuers 'from these latter proceedings pending the declarator here : 'otherwise, the same investigation into the same matter of 'fact, would be proceeding at twofold expense, in both 'Courts at the same time.'

Ld: President.

(β.) THE EXTENT:—The foreign adjudication then, may be pleaded to an action in the English Courts : it is apprehended, that the same rules which apply to the production of an English Judgment, apply also in a great measure to the production of a Foreign Judgment.

Second consideration. 'The extent.'

The suits must be identical in all the points mentioned in the extract from Vinnius, (page 24).

Identity if the suits.

'One of the criteria of the identity of the two 'suits in considering the plea *res judicata*, is the 'enquiry whether the same evidence would support 'both' (Lord Westbury, L.C.—*Hunter* v. *Stewart*). In that case the Lord Chancellor overruled the de-

Hunter v. *Stewart.* 4 De Gex F. & J. 168.

Ld: Westbury L.C.

cision of Wood, V.-C.—the allegations and equity of the bill in the English Court, although in respect of the same subject matter, being different from the allegations and equity of the original bill which had come before the Court in Sydney. The learned Vice-Chancellor in delivering judgment in *Simpson* v. *Fogo*, expressed his adherence to the decision of the Lord Chancellor :—'The Lord Chancellor was of opinion,' he said, 'that the *foundation to the* '*claim* being new, although in reference to the same 'subject matter, (and although it was the founda- 'tion of a claim which he possessed, and knew that 'he possessed at the time he instituted the original 'proceedings) he might file a bill in relation to that 'equity which he did not avail himself of in a 'former suit.'

Simpson v. *Fogo*. 32 L. J: Ch: 249.

Wood, V.-C. The *foundation* to the claim.

In *Callendar* v. *Dittrich*, a similar point arose ;— the defendant's plea was, that the plaintiff had impleaded the defendant for not performing the identical promises ; that the Court had adjudged that the plaintiff had no cause of action ; and that such judgment was final and conclusive. Tindal, C.J., said :—'I can't get over the first objection, that the 'judgment before us does not apply to the same 'contract as this action is for. This variance seems 'fatal ; without parol evidence to shew that it did 'relate to the same.' And Coltman, J. :—'The suit 'in the foreign Court seems to be rather for the 'rescission of the contract ; whilst the present ac- 'tion is for damages resulting from a breach of it : 'The plaintiff may not be entitled to rescind, and 'yet have damages.'

Callendar v. *Dittrich*. 4 M. & G. 68.

Tindal, C.J.

Coltman, J.

We have had also numerous authorities to the effect that, if the judgment is to be conclusive here, it must also be conclusive in the country where it was pronounced :

To be conclusive in foreign country.

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cf: Ricardo v. *Garcias*

12 Cl: & Fin: 368.

and it appears that this should be stated in the pleadings:

7 D. & R. 25.

cf: Plummer v. *Woodburne*

10 C. B: N. S. 149.

Frayes v. *Worms*

for example,

4 M. & G. 68.

cf: Callendar v. *Dittrich.*

To be final in foreign country. *Romilly, M.R.*

The judgment must also be final in the foreign Country:—'This Court has jurisdiction to enforce a 'foreign judgment: but it would be new to find that 'it could enforce it unless it were final.' (Romilly, M.R.—*Paul* v. *Roy.*)

Interlocutory judgment will not be enforced. *Romilly, M.R.*

Paul v. *Roy.* 21 L. J: Ch: 361.

That is to say, a judgment which is merely interlocutory, will not be enforced here:—'The Court will not give relief which must 'be enforced by a final judgment in another 'country.' The bill in *Paul* v. *Roy* was to enforce an interlocutory order of the Court of Session in Scotland:—'If I did so, I should be carrying on 'the bill concurrently with the Court of Session' (Romilly, M.R.)

Interim order.

Patrick v. *Shedden.* 22 L. J: Q. B. 283.

In *Patrick* v. *Shedden*, the Court arrived at a similar conclusion: the action was brought on an interim order of the Court of Session in Scotland, that execution might issue after a caution given. Lord Campbell, C.J., said:—'This 'is not to be considered as a judgment, but merely 'as an order for execution in the meantime upon 'the terms prescribed: these terms are liable to 'variation from time to time.' And Wightman, J.:—'The very name, interim order seems sufficient.'

Ld: Campbell, C.J.

Wightman, J.

Hall v. *Obder.* 11 East. 118.

Similarly in *Hall* v. *Obder*, where the judgment was for a sum certain found to be due from defendant to plaintiff, with interest thereon from a certain day past, but with a stay of execution till the further order of the Court:—'And this at first 'struck me,' said Lord Ellenborough, C.J., 'as an incomplete judgment, on which no action could be

Ld: Ellenborough C.J.

'maintained here: but we have been pressed with 'the course of proceedings in our own Courts, where 'on judgment recovered, and stay of execution on 'allowance of a writ of error, an action lies never- 'theless in the meantime on the judgment.'

In *Sadler* v. *Robins*, the defendant had been ordered to pay a certain sum on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer. The costs had not been taxed:—'The sum due on the decree is quite 'indefinite and can't be gone into here; if the 'decree had been perfected, it would have had 'effect given to it.' (Lord Ellenborough, C.J.)

Sadler v. *Robins*. 1 Camp: 253.

Ld: Ellenborough, C.J.

Appeal pending abroad.

But the finality of the judgment is not affected by the possibility, or likelihood of there being an appeal in the foreign country: nor even by the fact that an appeal is pending. (*Munroe* v. *Pilkington*). The foreign judgment is final until it is reversed by the Court of Appeal abroad, and may be enforced by an action in this country. (Erle, C.J., *Vanquelin* v. *Bouard*.) Mr. Westlake however thus modifies the principle:—'But when a judg- 'ment is of no force in its own country pending the 'appeal, it would seem that it ought on principle 'to receive no force here.' (International Law, § 377.) The principle being, that the judgment, not conclusive there, is not conclusive here.

Munroe v. *Pilkington*. 31 L. J: Q. B. 81.

Erle, C.J.

Vanquelin v. *Bouard*. 33 L. J: C. P. 78.

Westlake, § 377.

In *Castrique* v. *Behrens*, the doctrine of receiving the foreign judgment as final, until it is reversed, was expounded by Crompton, J.: delivering the judgment of the Court. (Cockburn, C.J., Wightman, Blackburn and Crompton, JJ.): It will be noticed that this case is the foundation of the doctrine of which frequent use has been made; that the English Court, when a foreign judgment comes before

Castrique v. *Behrens*. 30 L. J: Q. B. 163.

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it, does not sit as a Court of Appeal from the Foreign Court.

Castrique v. Behrens. 30 L. J: Q. B. 163.

The action was for maliciously and without reasonable and probable cause, setting the law of France in motion to the damage of the plaintiff. 'In a similar action for setting the English law in 'motion, it would be necessary to shew,' said the learned Judge, 'that the proceeding alleged to be 'instituted maliciously and without probable cause, 'has terminated in favour of the plaintiff, if from 'its nature, it be capable of such a termination. 'The reason seems to be, that if in the proceeding 'complained of, the decision was against the 'plaintiff, and was still unreversed, it would not be 'consistent with the principle on which law is 'administered, for another Court not being a Court 'of Appeal, to hold that the decision was come to 'without reasonable and probable cause.—There is 'no direct authority upon the point, but it seems 'to us, that the same principle, which makes it 'objectionable to entertain a suit grounded on the 'assumption that the unreversed decision of a Court 'in this country was come to without reasonable 'and probable cause, applies where the judgment, 'though in a Foreign Country, is one of a Court of 'competent jurisdiction, and come to under such 'circumstances as to be binding in this country.'

Castrique v. Behrens.

Crompton, J.

Action for maliciously and without reasonable and probable cause setting the law of France in motion.

English Court not an Appeal Court from foreign decisions.

It should also distinctly appear that there has been a judgment pronounced. Where there have only been proceedings in the nature of a judgment or decree, (as, for instance, the registering a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poining), it should be averred that such proceedings are, in the Foreign Country, equivalent to a decree: it then becomes a question at *Nisi*

Proceedings in the nature of a judgment.

Prius, whether the proceedings proved are so equivalent or not. (*Hay* v. *Fisher*).

Hay v. *Fisher*. 2 M. & W. 722.

But if this sufficiently appears, the foreign law on the subject need not be set out. (*M'Leod* v. *Schultze*).

M'Leod v. *Schultze*. 13 L. J: Ex: 321.

The suit and the judgment should be set out with certainty as to dates; and should not be pleaded historically. (*Foster* v. *Vassall*).

Foster v. *Vassall*. 3 Atk: 587.

Judgment to be on the merits.

It is essential that the foreign judgment should have been *on the merits* of the case. A judgment therefore, recovered in a Foreign Court on a plea of the Statutes of Limitation of that country, will not be recognised in this country. The leading authority on this point is *Huber* v. *Steiner*, where the distinction was drawn between that part of the law relating *ad decisionem litis*, which is adopted from the Foreign Country; and that part relating *ad litis ordinationem*, which is taken from the *lex fori* of that country where the action is brought. Statutes of Limitation are essentially connected with the conduct of the suit, and part of the *lex fori*; varying it may be, in every forum, and with every subject-matter:—'It is only the remedy, and 'not the cause of action that is barred by the 'Foreign Statute; the Foreign prescription is no 'more than a limitation of the time within which 'the action must be brought in the Foreign Court.' (Tindal, C. J., *Huber* v. *Steiner*). All that the Foreign judgment declares is, that by the lapse of so many years, the plaintiff has lost his right to sue in the Courts of that country, (Lush, J., *Harris* v. *Quine*), and not that he has lost his right to sue in the Courts of any other country, in which he is entitled to bring an action for the same cause. In the same case—(*Harris* v. *Quine*)—Blackburn, J. forcibly expressed his views upon the subject:—'The

Judgment on Foreign Statute of Limitation.

Huber v. *Steiner*. 2 Sc: 304.

Effect of the judgment.

Lush, J.

Harris v. *Quine*. L. R. 4 Q. B. 653.

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'plea shews that the Manx Court has decided that 'the debt is barred in three years; but I don't 'really see why by the Comity of Nations we 'ought to hold the debt barred here: where it 'appears that the very point in dispute has been 'the subject of an express decision in a Foreign 'Court, we are estopped from dealing with it; but 'it would be very strange if the decision of the 'Manx Court that three years has elapsed since 'the cause of action, should be an answer to it in 'England.'

In the following cases the same views are expressed :—

[1] 8 Mo: P. C. C. 4. *Ruckmaboye* v. *Lulloobhoy Mottichund*[1]

[2] 8 Cl: & Fin: 121. *Fergusson* v. *Fyffe*[2]

[3] 2 Beav: 282. *Cooper* v. *Earl Waldegrave*[3]

[4] 1 B. & Ad: 284. *De la Vega* v. *Vianna*[4]

[5] 6 C. & P. 25. *Trimby* v *Vignier*[5]

[6] 1 C. B: N. S. 266. *Kelsall* v. *Marshall*[6]

Kelsall v. *Marshall*. 1 C. B: N. S. 266.

In *Kelsall* v. *Marshall*, an Indian Act relating to procedure was in question : it was held that Foreign and Colonial Acts relating in any way to procedure have no effect out of the Country.

General proposition.

English Statutes of Limitation extend to India.

The English Statutes of Limitation extend to India, and apply to Hindoos and Mahommedans as well as to Europeans in the Superior Courts—(*Ruckmaboye* v. *Lulloobhoy Mottichund*).

There are two ways of considering the question :—

Cockburn, C.J.

Harris v. *Quine*. L. R. 4 Q. B. 653.

In *Harris* v. *Quine*, Cockburn, C., J. based his decision upon the ground of the dissimilarity of the issues : a ground, it will be remembered, fatal to the plea of judgment recovered :—the issue in the Manx Court was whether three years had elapsed : in the English Court, whether six years.—There may of course be a coincidence in the number of years

necessary, by the English and Foreign Statutes, to destroy the cause of action.

Practice of the Courts agrees with principles in this chapter.

The practice of the Courts coincides also in every respect with the principles advanced in this chapter. The Courts have declared that the fact of the judgment having proceeded on a Foreign Statute of Limitation does excuse the plaintiff's obedience to the negative obligation. In so doing, have they acted as Appeal Courts from the Foreign Court? Clearly not:—For there has been no judgment upon the merits abroad, which it would be the province of a Court of Appeal to review: Neither do they criticize the Foreign Statute: they have only acted upon a doctrine of International Law, that each Country is entitled to regulate the procedure of its own Courts; and have declared the English Statutes limiting the time in which an action may be brought in English Courts, to be different from the Foreign Statutes.

Proof of Foreign Judgments.

Before concluding this chapter, the method in which Foreign Judgments are to be proved, when they are brought before the English Courts, must be noticed. This is provided by the Statute 14. & 15. Vic: c. 99. ss: 7. 11—

14. & 15. Vic: c. 99. s. 7. Sealed copy of the judgment to be received.

14. & 15. Vic: c. 99. s: 7.

All proclamations, treaties and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any British Colony, *and all affidavits, pleadings, and other legal documents filed or deposited in any such Court*, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to

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say, *if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and* if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, *or an affidavit, pleading or other legal document filed or deposited in any such Court*, the authenticated copy to be admissible in evidence must purport either to be sealed either with the seal of the foreign or colonial Court to which the original document belongs, or in the event of such Court having no seal, to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said Court, and such Judge shall attach to his signature a statement in writing on the said copy, that the Court whereof he is Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

14. & 15. Vic: c. 99. s. 7.

Signature of Judge.

14. & 15. Vic: c. 99. s. 11.

Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the British Colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive and examine evidence, without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same.

s. 11.

Admissible in the same degree in the colonies.

Practice in Foreign States. WESTLAKE.

As far as it is possible to ascertain them we may notice here the rules that prevail in the other States.

German States : the judgments of the (various) States were received mutually as *res judicata* : but not judgments of other countries.

in those States east of the Rhine, the same rule prevailed, whether the State had a code or adopted the Roman Law : the condition of reciprocity being substituted for that of membership of the Germanic Body.

Prussia : a foreign judgment is considered *res judicata ;* except judgments against Prussian subjects given in countries where Prussian judgments are submitted to examination.

Denmark, *Switzerland*, (*Sardinian and Papal States*) } a judgment of either of the others is considered *res judicata* : and also of any other state in which the rule prevails of allowing the force of *res judicata* to judgments of another country (with or) without demanding reciprocity.

France : the judgment appears to be always examined, unless by Treaty arrangement it receives additional force.

Belgium : a foreign judgment is considered *res judicata* ;— except a French judgment ; by the Law of Sept : 9— 1814.

Sweden, *Spain*, *Norway* } The judgment is received as evidence of the original obligation in the suit on the original cause of action.

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IN this Chapter we propose to consider what defences may be set up by the defendant, in an action on a foreign judgment.

The Court abroad, of competent jurisdiction, having adjudicated a certain sum to be due, a legal obligation has arisen in the foreign country, to pay that sum. But whilst the Courts of one nation willingly lend their assistance to successful suitors in actions decided by the Courts of another nation, and pay that deference which is due to jurisdictions co-equal in rank with themselves, they must of necessity pay some attention to the defence; and the difficulty always present in an action upon a Foreign judgment is, how extensive shall be the enquiry suggested as requisite by the defence;—how far the plaintiff's claim may be tested in the interests of justice, without seeming to derogate from the high authority of the Court that has pronounced the judgment.

The subject divided.

There are two persons before the English Court in which the action upon the Foreign judgment is brought:—The plaintiff who has obtained it;—The Court that has pronounced it:—The conduct of either, at the trial of the original action, may have been such as to cause the English Court to look with disfavour upon the result: A convenient division therefore, for the consideration of the subject, will be to inquire how far the English tribunal will sift, first: the conduct of the plaintiff; secondly, the proceedings of the Court.

The principle of the inquiry will be the same in both cases.

We have seen that a legal obligation arises abroad upon the judgment, to pay the sum adjudicated by the Foreign Court to be due:—'It follows 'that anything which negatives the existence of

Blackburn, J.

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'that legal obligation, or excuses the performance 'of it, must form a good defence to the action.' (Blackburn, J., *Godard* v. *Gray*.) Thus, the defences that may be raised, group themselves under these two heads or tests :

Godard v. *Gray*. L. R. 6 Q. B. 139.

Two tests to be applied to defences.

i. does it negative the existence of the obligation ?

ii. is it sufficient to excuse the performance of it ?

First, as to the conduct of the plaintiff:—if it has been fraudulent, if he has irregularly and unduly obtained the judgment he is seeking to enforce ; that undoubtedly, the defendant proving it, will be sufficient to excuse the performance of the obligation.

Conduct of plaintiff. *Bramwell*, *B.* his fraud.

Upon this point, there is no conflict of authority, as will be seen on reference to the following cases :—

Reimers v. *Druce* [1]
Bank of Australasia v. *Nias* [2]
Messina v. *Petrococchino* [3]
Crawley v. *Isaacs* [4]
Bowles v. *Orr* [5]
Castrique v. *Imrie* [6]

[1] 26 L. J: Ch: 196.
[2] 20 L. J: Q. B. 284.
[3] L. R. 4 P. C. 144.
[4] 16 L. T: N. S. 529.
[5] 1 V. & C. 464.
[6] 30 L. J: C. P. 177.

and many others ; it would be impossible, so numerous are they, to refer to every decision, or every judgment, in which the Judge has expressed his concurrence with this principle. In every attempt at a classification of defences that has been made, however imperfect, the Fraud of the plaintiff as a sufficient excuse, has always been prominently put forward. In *Godard* v. *Gray* alone, has any hesitation to admit the proposition been apparent ; a hesitation somewhat inexplicable. Blackburn, J., in giving a careful classification of defences, says, '*probably* the defendant may shew that the judg-

Blackburn, *J.*, appears to have hesitated in accepting the proposition.

'ment was obtained by the fraud of the plaintiff'—but this dictum cannot be regarded as throwing any real doubt upon the proposition.

Martin, B. This fraud must be fraud in procuring the judgment, such as collusion or the like; it cannot be set up that the defence to the suit was fraudulent. (Martin, B., *Cammell* v. *Sewell.*)

Cammell v. Sewell. 27 L. J: Ex: 447.

Ld: Lyndhurst, L.C. 'The judgment obtained by the creditor abroad 'is—(subject to the exceptions we are now con- 'sidering)—as conclusive here as it is in the country 'in which it was obtained—for it may be recovered 'in an action either there or here according as the 'judgment debtor can be got at abroad or in Eng- 'land. It therefore becomes a security here, and 'like any other security available in this country, 'must be affected by fraud; and a bill may be filed 'for relief. Perhaps it might be said that on shew- 'ing a strong case, the party might defeat the 'judgment even at law.' (Lord Lyndhurst, L.C., *Bowles* v. *Orr*).

Bowles v. *Orr.* 1 You: & C. 464.

For example:—

Examples of judgments set aside for fraud.

Frankland v. *M'Gusty*:—an appeal against a decree pronounced in Demerara upon judgments given in S. Vincent's, in respect of considerations arising in that Island. The judgment in S. Vincent had been confessed on a warrant of attorney, there being no such power. The decree was reversed.

Frankland v. *M'Gusty.* 1 Kn: P. C. 274.

Blake v. *Smith*:—a partnership action. The Court by means of an injunction, set aside a Portuguese judgment which had been obtained by the fraud of one of the partners.

Blake v. *Smith.* cit: 8 Sim: 303.

Proceedings of the Court.

Secondly, as to the proceedings of the Court:—

Its jurisdiction.

I. THE COURT'S JURISDICTION.

The defence attacking the Court's jurisdiction will be considered under two heads:—

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A. *its jurisdiction over the person.*
B. *its jurisdiction over the thing.*

A. '*That the Foreign Court had no jurisdiction* Over the person.
'*over the person of the defendant.*'

There seems to be no break in the authorities, tracing them back from the present time, in favour of the defendant's successfully raising this defence. More generally stated, the proposition is, that the judgment will be disregarded if the Court had not jurisdiction of the subject-matter of the suit—as in the *Bank of Australasia* v. *Nias* and *The Huldah.* This includes both divisions.

Bk: of Australasia v. *Nias.* 20 L. J: Q. B. 284.

The Huldah. 3 Rob: A. R. 235.

With regard to the first, absence of jurisdiction over the person forming a good defence, as a general proposition, rests upon the most elementary principles of justice; that a man, not in any way subject to the laws of a foreign state, cannot be held bound by the decisions of its Courts: A judgment pronounced against him by such a Court cannot raise a legal obligation to obey that judgment: The existence of the obligation may therefore be at once negatived:—'An inquiry is open 'whether the judgment passed under such circum- 'stances as to shew that the Court had properly 'jurisdiction over the party.' (Lord Denman, C.J.— *Ferguson* v. *Mahon.*) And to the same effect, Blackburn, J., in *Castrique* v. *Imrie*:—'It may very 'well be held that the foreign country has no juris- 'diction to pronounce judgment against a person 'behind his back, who is not subject to its 'jurisdiction.'

Ld: Denman, C.J.

Ferguson v. *Mahon.* 11 A. & E. 179.

Blackburn, J.

Castrique v. *Imrie.* 30 L. J: C. P. 177.

But circumstances very frequently exist by reason of which a subject of one state is under the laws of a foreign state; and therefore a judgment pronounced against him by the Courts of that foreign

state, does raise the legal obligation to obey that judgment.

The general proposition may be thus stated :—

General proposition.

A, a subject of, and residing in a state Y, is not bound by a judgment obtained against him by B, a subject of and residing in a state Z, in the Courts of Z.

Modifications to be considered.

We must proceed to consider what modifications in these conditions are necessary to raise the legal obligation of obedience to the judgment :—taking for our guide, the judgment of Lord Blackburn in *Schibsby* v. *Westenholz.*

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155

First modification.

The conditions remaining the same, they may be modified :—by

Conditions under which defendant will be bound.

SUBMISSION TO THE TRIBUNAL.

a. Submission implied—by becoming a shareholder in a foreign Company, with agreement in Articles to submit to jurisdiction of some particular Court :

Shareholder with submission to particular tribunal.

the shareholder in such Company, is in all things, *quâ* the Company, subject to the foreign law and procedure (*Copin* v. *Adamson*).

Copin v. *Adamson.* L. R. 9 Ex: 345.

In this case, there was a provision in the French Company's Articles, under which the shareholders agreed that all disputes which might arise during the existence of the Company, or during its liquidation, should be submitted to the jurisdiction of the Tribunal de Commerce of the Department of the Seine. The Lord Chancellor, affirming the decision of the Exchequer, decided that the existence of such provisions amounted to an agreement on the part of every shareholder, whether a subject of the Country, or a foreigner, to be bound by a judgment so obtained.

A direct submission therefore will render the shareholder liable to obey a judgment of even an

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inferior foreign tribunal; by which he otherwise would not have been bound.

β. Submission implied—doubtful:—by becoming a shareholder in a foreign Company; without any special agreement as to submission to a tribunal. Shareholder without submission.

Where there is no such agreement in the articles, a more difficult point arises: the Lord Chancellor, in his judgment in *Copin* v. *Adamson*, hinted at the possibility of the case arising, without suggesting an answer. The real principle of that case was the express submission to an inferior tribunal: no argument therefore can be deduced from that decision in any way preventing the affirmance of this proposition; and that submission should be implied by the fact of taking shares in a foreign Company, does not appear unreasonable; for why should a man be entitled to take profits, and to become in all other respects, *quâ* the Company, like one subject to the Foreign State, and not at the same time incur the liabilities of the subject?

Copin v. *Adamson*. L. R. 9 Ex. 345.

The shareholder is in the same position as a partner in a foreign firm with an elected foreign domicil. Partner in foreign firm.

There appears to be no case at present in which this point has been expressly decided; but the general practice of the English Chancery Courts seems to be, to make an order for payment of calls on Foreign Contributories to an English Company, for what it is worth: It is believed that Foreign Courts do enforce these orders, upon proof that the English procedure has been complied with. Practice in Chancery.

I am informed that this was the course pursued by the French Courts in the case of the General International Agency.

In *Leishman* v. *Cochrane*, an *ex parte* order of the Supreme Court of Calcutta on a shareholder in Mauritius, to contribute to the assets of an Indian Company, was upheld. It was also held to be an 'order or other judicial proceeding' within the provisions of 14. & 15. Vic : c. 99. ss. 7. 11 : and was therefore proveable by certified copy.

Leishman v. *Cochrane.* 12 W. R. 181.

14. & 15. Vic: c. 99. ss: 7. 11.

Voluntary appearance.

γ. *Submission implied*—by having appeared voluntarily to take the chance of a judgment in his favour.

(*De Cosse Brissac* v. *Rathbone*).

Brissac v. *Rathbone.* 30 L. J: Ex: 238.

In this case, there is an almost direct submission to the foreign tribunal; for there is an evident intention on the part of the defendant to make use of the judgment, should it be in his favour. It would be manifestly unjust to allow him to make a conditional appearance : if he does appear, he must by so doing, be taken to submit to the jurisdiction ; a submission which he himself would be the first to make use of, and justly, if the plaintiff being unsuccessful abroad were to bring an action in England upon the original cause of action. Therefore, if the decision be adverse to him, this submission cannot be withdrawn.

Involuntary appearance to save property.

δ. *Submission implied*—doubtful :—by having appeared, in order to endeavour to save property in the hands of the Foreign Court, and so far, not voluntarily.

The effect of such an appearance is very doubtful; Lord Blackburn in *Schibsby* v. *Westenholz*, while expressing an opinion strongly in favour of the defendant not being bound in such a case, thought it better, the authorities appearing conflicting, to leave the question open. He said that in *Simpson* v. *Fogo*, the mortgagees of an English ship had come into the Courts of Louisiana, to endeavour to

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

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Simpson v. *Fogo.* 32 L. J: Ch: 249.

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prevent the sale of their ship seized under an execution against the mortgagors, and the Courts of New Orleans disregarded their claim; that it was taken for granted by the Vice-Chancellor and the very learned counsel who argued in the case, that the mortgagees would have been bound by the decision, although they had only appeared to try and save their property; but that there had been a contemptuous disregard of English law by the Foreign Court:—He said further that the case of *The General Steam Navigation Co*: v. *Guillon* supports the proposition that the defendant would be bound; and that not being referred to in *Simpson* v. *Fogo*, it cannot be considered as dissented from.

Gen: Navigation Co: v. Guillon. 13 L. J: Ex: 168.

Malins, V.C., held, in *re the S. Nazaire Co: Limited;—ex parte the European Bank* (not reported), that the S. Nazaire Company, having appeared to protest against the jurisdiction of the French Court, were so far bound, as to be precluded from setting up that the judgment had been obtained irregularly.

re S. Nazaire Co: exp: European Bk:

Malins, V.C.

The point is one of great difficulty: but this difficulty is in some degree diminished by the admission of a doctrine founded upon the judgment of the Court of Exchequer in the above-mentioned case, *The General Steam Navigation Co*: v. *Guillon* (Lord Abinger, C.B.—Parke, Alderson and Gurney, BB:), and approved by the Queen's Bench, in *Schibsby* v. *Westenholz.* (Blackburn, Mellor, Lush and Hannen, JJ:)—*viz*: that appearing to defend merely, does not import a legal obligation to obey the judgment.

A doctrine upon the subject generally approved.

Schibsby v. Westenholz. L. R. 6 Q. B. 155.

Is then the legal obligation to obey raised in this case, where, together with the appearance, there is also a protest against the jurisdiction of the Court; or rather, where the appearance itself is a protest;

that being the only method of endeavouring to prevent the Court from exercising an authority which does not properly belong to it? It certainly would seem that no stronger case short of absolute compulsion, could be imagined of an appearance which does not carry with it a submission to the jurisdiction of the Tribunal: moreover, it is a pro-

Blackburn, J. position which appears to be absolutely necessary to the safety of property, which might otherwise be seized and adjudicated on in the most arbitrary manner in some Foreign Country; and it is necessary to protect our citizens so far, that they 'shall 'not be in a worse position in one state than in 'another.' (Blackburn, J.)

Arguments from preceding discussion. The arguments deducible from the doctrine last discussed, do not tend to bring us here to any definite conclusion: on the one hand, voluntary appearance importing submission, would seem to imply that involuntary appearance would not import submission; and on the other hand, a remark then made seems equally applicable here; that, if the judgment abroad should by any chance be given in favour of the defendants, they would be justified in making use of it, if the unsuccessful plaintiff were to bring an action in England, upon the original cause of action.

Selection of tribunal. ε. *Submission implied*—by selecting the tribunal in which to bring the action.

As, by appearing voluntarily to take the chance of a favourable judgment in a Court which has no jurisdiction over his person, the defendant is bound by an adverse decision; so the plaintiff, making a choice of the tribunal in which to bring the action,

Parke, B. and selecting one which would otherwise have no jurisdiction over his person, thereby submits to its authority, so as to be bound by its decision whether

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it be for, or whether it be against him. (Parke, B.—*General Steam Navigation Co*: v. *Guillon*).

Gen: Navigation Co: v. Guillon. 13 L. J: Ex: 168.

Thus in *Novelli* v. *Rossi*, the defendant, without waiting for the decision of an English Court, which would in all probability have been in his favour, and would have guided the French Court in its decision, went at once to the French Courts: the decision, given in ignorance of the English law upon the subject, was adverse to him. He was held bound by that decision, it being the consequence of his own act.

Novelli v. *Rossi.* 2 B. & Ad: 757.

The conditions of the general proposition may also be varied—

1st: variation of general proposition:—contract made abroad.

i. A is within the state Z at the time of entering into the contract; but leaves it before the institution of the suit.

'We are inclined to think,' said Blackburn, J., 'that 'the laws of the country where the contract was 'made would bind the defendant—though,' he adds, 'before finally deciding the question we should like 'to hear it argued.'

Blackburn, J.

There seems to be here a *quasi*-submission to the laws of the foreign state, by making a contract under its auspices. Moreover, should the same contract come before English Courts, all questions decided upon it would be governed by the *lex loci contractus*; there can be therefore very little doubt that a judgment *loci contractus* would be received in England as binding on the parties.

2nd: variation:—temporary allegiance.

ii. A, a subject of state Y, but owing temporary allegiance to state Z;

that is, resident—not necessarily domiciled—in the foreign country; by which residence he obtains the benefit of the protection of the foreign laws: for the protection he receives, he owes submission to them; and he is therefore bound by a judgment

pronounced under those laws by the Courts of the foreign country.

A resident alien is in almost every respect treated as a subject: the same protection is afforded him, the same obedience required of him, as well as the same knowledge of the laws of the land: he is entitled to make use of the Courts, and a judgment recovered by him will be enforced by the same process as one recovered by a subject; so also he must submit to the decision of the Courts if it be against him.

3rd: variation:—an alien.

iii. A, subject of the state Z,

at the time of the judgment which is sought to be enforced against him: An alien is clearly bound in England by a judgment pronounced against him by the Courts of his own country: his change of residence after the legal obligation to obey has once been raised by the judgment, cannot possibly have the effect of removing or in any way altering that obligation.

Variations in B's status.

It can also make no difference to A's obligation to pay, what B's status is at the time of bringing the action to enforce that obligation; that is to say, whether B is a subject of the states Y or Z; or whether he merely owes temporary allegiance to the state Y.

The consideration of Order XI., rules 1 and 1*a*, of the Judicature Acts, forms a fitting conclusion to the discussion of the question of impeaching the Jurisdiction of the Foreign Court over the person of the defendant.

ORDER XI. *rule* 1.

O. xi. r. 1. *Service out of the jurisdic-*

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever the whole or any part of the subject matter

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of the action is land or stock or other property situate within the jurisdiction, or any act, deed, will or thing affecting such land, stock or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered was or is to be done or is situate within the jurisdiction.

tion: in what cases.

Rule 1*a.*

Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the Judge in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England, or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

O. xi. 1. 1a.

Circumstances to be considered by the Judge.

Scotland and Ireland.

Affidavit.

We will suppose a judgment given in England against a foreigner not resident in England, nor a shareholder in an English Company—under these rules, and an action brought upon this judgment in the Courts, say of the United States—(where the law as to the enforcing foreign judgments is the

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

Hypothetical case, following *Blackburn, J.*, in *Schibsby* v. *Westenholz.*

same as our own). The defendant impeaches the jurisdiction of the English Court over his person. The question for the American Court would be;—Is the defendant under any obligation which that Court could recognise, to submit to the jurisdiction created by the English Act of Parliament? [It is with submission, suggested that the prior question as put by the learned Judge, 'whether the Acts of 'the British legislature, rightly construed, gave us 'jurisdiction over this foreigner,' could not be discussed by the American Court; for, as we shall see hereafter, the Court that has pronounced the judgment must in all things be presumed to have acted rightly, and to have rightly construed the law of its own country:—'We must give credit to a foreign 'tribunal for acting within the jurisdiction con-'ferred on it by its own law.' (Blackburn, J.—*Castrique* v. *Imrie*.)] The American Courts then would properly ask;—Can the Island of Great Britain pass a law to bind the whole world? and the answer should be;—no—but every country can pass laws to bind a great many persons. Was this person such an one—not as would come within the statute, that being the question of construction—but, against whom such a statute could be enforced?

Castrique v. *Imrie*. 30 L. J: C. P. 177.

Cases where the writ is issued out of the jurisdiction.

Now, Order XI, rule 1*a*, is not an arbitrary enactment, to the effect that any one in England, supposing himself to have a cause of action against a foreigner not resident within the jurisdiction of the English Courts, may issue the writ of summons or notice in lieu of writ therein provided, and proceed upon it: but it is coupled with rule 1, which lays down in what cases the writ will be issued: they are,

i. where the Court has jurisdiction over the

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thing, in respect of which, or in respect of anything affecting which, the action is brought. O. xi. r. 1.

ii. in actions the subject of which is a contract; where the contract was made, or where the breach of contract occurred, within the jurisdiction.

iii. where the act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction.

Under the Common Law Procedure Act, 1852. s. 18. the cases in which the writ could be issued out of the jurisdiction were either, C. L. P. Act. 1852. s. 18.

i. where the cause of action arose within the jurisdiction; or,

ii. where the cause of action was in respect of the breach of a contract made within the jurisdiction.

Thus the effect of the question to be asked by the foreign Court is narrowed within very small limits:—Is the Island of Great Britain right in passing such a statute for the protection of its subjects? Are the cases for which it provides a remedy such, that the raising of the legal obligation to obey a judgment given in accordance with such a statute, is not unreasonable nor at variance with natural justice? These questions being considered by tribunals, whose decisions are received as of weight, it is believed that the judgment of the English Court, deciding that the defendant was within the scope of the statute, would be supported: This leads us to frame a second modification of the general proposition:—

Second modification of the general proposition.

If the judgment obtained by B against A is founded upon a statute passed by the state Z, which, on being considered by the Courts of the state Y, is found not to be an unreason-

able protection afforded to the subjects of Z; nor at variance with the principles of Natural Justice; A will be bound.

This is the ultimate conclusion from the general theory. I have advanced to it somewhat hesitatingly, being fully conscious that the *decision* of *Schibsby* v. *Westenholz* does not support it: But it has been arrived at in the first instance, by the aid of many of the arguments used in the judgment delivered in that case; and it seems to be the legitimate consequence, not merely of the Comity of Nations having entered into the theory, but also of the principle which presumes that justice is of necessity resident in the Legislatures and in the Courts of all States.

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

Necessary assumption that justice is not exclusively resident in England.

> The reader is referred to the discussion in the First Chapter upon 'the courtesy interchanged,' page 22; in this Chapter, upon the defence of 'absence,' page 120; and to the Note upon the Summary to this Chapter, page 139.

Jurisdiction over the thing.

B. '*That the Foreign Court had no jurisdiction over the thing.*'

General proposition.

The general rule may be thus stated:—

> A is not bound by a judgment obtained by B in the Courts of a state Z; where Z has no jurisdiction over the thing.

The rule has been expressed as a negative proposition, because the positive proposition, its converse, is not strictly true:—for, although a state has jurisdiction over all property within its borders; yet the proposition, that A is bound by a judgment obtained by B in the Courts of a state Z, where Z has jurisdiction over the property; has to be thus far qualified; that a jurisdiction by Z over A does not necessarily exist, merely on account of his possessing property within the territory of Z.

The converse proposition not strictly true.

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Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

'We doubt very much,' said Blackburn, J., in *Schibsby* v. *Westenholz*, 'whether the possession of 'property locally situated in the country and 'protected by its laws makes him bound:—it 'should rather seem that whilst every tribunal may 'very properly execute process against the property 'within its jurisdiction; the existence of such pro- 'perty, which may be very small, affords no suffi- 'cient ground for imposing on the foreign owner 'of that property a duty or obligation to fulfil the 'judgment.' *Blackburn J.*

Circumstances may exist, apart from the possession of the property, which would render the possessor subject to the jurisdiction. Any of those for instance which have been considered under the head of 'Jurisdiction over the person' may be combined with such possession of property: they would of themselves render the owner liable. But none of these existing, it is necessary to inquire what is requisite beyond the mere possession of property, to render the possessor liable to the jurisdiction of the country where it is situated.

Circumstances which render the owner of property liable to the jurisdiction of the country in which it is situate.

First; as to the nature of the suit itself:—If it involve a question as to the right to land; on that point the decision of the Foreign Court will be final; and the foreign owner will be bound by it. (Romilly, M.R.—*Cood* v. *Cood.*)

Nature of the suit.

Cood v. *Cood.* 33 L J: Ch: 273.

Secondly; as to the nature of the thing:—

Nature of the thing.

i. If it be *realty*, or any heritable property, its existence in the foreign country will create a jurisdiction over its owner—(*L. & N. W. Railway* v. *Lindsay*).

Realty.

L. & N. W. R. v. *Lindsay.* 3 Macq: H. L. ca: 99.

ii. If it be *personalty*, it is doubtful whether this jurisdiction would be created, or whether the law of the owner's domicil would not attach to it.

Personalty.

In two cases however, it may be considered as settled that a jurisdiction over personalty is created in the foreign country:

Scotch Arrestment.

α. Scotch Arrestment:—as to which, see the judgments of the Lord Chancellor and Lord Brougham in the *London & North Western Railway* v. *Lindsay*.

L. & N. W. R. v. *Lindsay.*

Foreign Attachment.

β. Foreign Attachment in the City of London, (or rather any similar custom of attaching property which may obtain in any Foreign City—as for example—*Trustee Process, in the City of New York*).

3 Macq: H. L. ca: 99.

Trustee Process.

Suppose, for instance, money attached according to the custom of the City of London. In an action in the Courts of a country (following the same principles with regard to enforcing foreign judgments as our own Courts),—that the money was so seized, would be a good reply to a defence setting up want of jurisdiction in the English Courts over the thing.

Example.

The case of *Gould* v. *Webb* is an example:—the plea stated that part of the amount claimed had already been attached in the defendant's hands, and had been paid according to the law of New York; and therefore that the defendant was discharged and acquitted of the said sum. It was held a good defence *pro tanto*. Lord Campbell, C.J., said:—

Gould v. *Webb.* 24 L. J: Q. B. 205.

Ld: Campbell, C.J.

'The plea substantially avers that the law of 'Foreign Attachment prevails at New York.'

Conclusions.

The conclusions are therefore; that where the thing is not in the territory of the Foreign Country, the defence is good:

that, where the thing is within the territory of the Foreign Country, the defence may be good, but only in the case of personalty; that even in the case of personalty, there are two instances where

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the defence cannot be set up; and that, as to other cases, considerable doubt on the subject exists.

II. Error on the part of the Court.

The Court's Error.

An Error in the proceedings is either apparent on the face of the record; or requires to be proved by the aid of extrinsic evidence.

The defence, setting up error of the Court will be considered under the following heads:—

Division of the subject.

A. an erroneous conclusion from the facts, or as to the merits of the case.
B. a mistake in its own law.
C. a mistake in the law of another Country which it has professed to declare.
D. a mistake in its own procedure.

The enquiry under the head of Error, or mistake on the part of the Foreign Court, is attended with many and great difficulties, so varying are the dicta of the eminent Judges who have expressed opinions on the subject.

Preliminary division of 'error.'

The preliminary division, into what I shall call 'apparent,' and 'proveable' error, has been objected to by Lord Blackburn, in the elaborate judgment of himself and Mellor, J., in the case to which such frequent reference has been made—*Godard* v. *Gray*. But the division, at least for the consideration of the subject, is a convenient and not unnatural one.

Godard v. *Gray*. L. R. 6 Q. B. 139.

The principles already enunciated as the guide for determining whether a defence is good or bad, will most materially assist us here, and must never be lost sight of. For convenience they may be re-stated:

Principles of defence re-stated.

i. does the defence raised negative the existence of the foreign obligation?
ii. is it sufficient to excuse the performance of that obligation?

['record' has been here used for convenience, and not strictly.]

But now, for the first time, the English Court has the foreign record itself before it. The defences already considered, — the plaintiff's fraud — the Court not having jurisdiction—are preliminary to the consideration of the contents of the record: —but, the record now lying open before the Court, to the above principles must be added that equally important one discussed in the first chapter:

iii. The English Court does not sit as a Court of Appeal from the Foreign Court.

Power of the English Court.

The assistance of the English Court has been invoked to clothe the legal obligation which has arisen abroad upon the judgment of the Foreign Court, with the auxiliary international sanction which is resident in the English Sovereign Authority. It cannot go beyond the power accorded to it by International Comity, and constitute itself a Court of Appeal, by going into the merits of the case which the Foreign Court has already adjudicated upon.

Error on the facts, or on the merits.

A. *That the Foreign Court has come to an erroneous conclusion from the facts of the case, or as to its merits.*

a. A PROVEABLE ERROR.

Proveable error.

The effect of this defence is, the defendant asserts that the Foreign Court having had the facts of the case proved before it, has come to an erroneous conclusion upon those facts; that the judgment thereupon is erroneous; and that he, the defendant, can prove the error to the satisfaction of the English Court.

Such a defence cannot be entertained :—Acting upon the last-mentioned principle, not sitting in appeal from the Foreign Court, it will not go into the merits of the case:—'Since the decision in the

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'case of the *Bank of Australasia v. Nias*, we are 'bound to hold that a judgment of a foreign Court 'having jurisdiction over the subject matter cannot 'be questioned on the ground that the foreign 'Court had come on the evidence to an erroneous 'conclusion as to the facts'—(Cockburn, C.J.—*Munroe* v. *Pilkington*). The case of the *Bank of Australasia* v. *Nias* appears to be the first express decision upon this point. Lord Campbell, C.J., in delivering judgment, refused either to reconcile or contrast the authorities which had been cited :—'It 'is enough to say,' he remarked, 'that the dicta 'against retrying the cause are quite as strong as 'those in favour of this proceeding; and being left 'without any express decision, now that the 'question must be expressly decided, we must look 'to principle and expediency.'

Cockburn, C.J.

Bk: of Australasia v. *Nias.* 20 L. J: Q. B. 284.

Munroe v. *Pilkington.* 31 L. J: Q. B. 81.

Ld: Campbell, C.J.

β. AN APPARENT ERROR.

Were it not for the dictum above referred to of Blackburn and Mellor, JJ., in *Godard* v. *Gray*, it would appear from the authorities to be settled that a 'foreign judgment of a competent Court may 'be impeached, if it carries on the face of it a 'manifest error'—(Sir R. Phillimore — *Messina* v. *Petrococchino*, delivering the judgment of the Privy Council: Sir J. W. Colville, Sir R. Phillimore, Sir J. Napier, Sir Montague Smith, and Sir R. P. Collier).

Apparent error.

Godard v. *Gray.* L. R. 6 Q. B. 139.

Messina v. *Petrococchino.* L. R. 4 P. C. 144.

Decision of the Privy Council.

This opinion follows the judgment of Romilly, M.R., in *Reimers* v. *Druce*:—'It is clear that a foreign judgment sought to be enforced in this 'country, is, in addition to the grounds referred to 'by Lord Campbell, C.J., in the *Bank of Australasia* 'v. *Nias*, impeachable for error apparent on the face 'of it, sufficient to show that such judgment ought not

Reimers v. *Druce.* 26 L. J: Ch: 196.

Romilly, M.R.

'to have been pronounced. But this leaves open 'the nature and extent of the apparent error suffi-

Definition of apparent error.

'cient to invalidate the judgment. By that, I mean, 'such error as shews upon the face of the judgment 'itself, without any extrinsic evidence, that the 'Judges had come to an erroneous conclusion '(either of law or) of fact.'

Bk: of Australasia v. *Nias.* 20 L. J: Q. B. 284.

Ld: Colchester. 'A Foreign sentence, though not strictly pleadable, yet has 'been held by Lord Kenyon to be conclusive evidence, and 'only to be falsified by shewing error apparent'—(Lord Colchester's MSS:—cited, 3 Swanston, p. 712).

Conflict of decisions.

These are the most important decisions supporting the principle: there remains to be stated the very eminent opinion against it. [It will be well to bear in mind the order of date in which these three judgments were delivered—*Reimers* v. *Druce*, 1857; *Godard* v. *Gray*, 1870; *Messina* v. *Petroccochino*, 1872.]

Blackburn, J. 'It can make no difference that the mistake 'appears on the face of the proceedings. That, no 'doubt, greatly facilitates the proof of the mistake; 'but if the principle be to enquire whether the 'defendant is relieved from a *primâ facie* duty to 'obey the judgment, he must be equally relieved 'whether the mistake appears on the face of the 'proceedings, or is to be proved by extraneous 'evidence.' (Blackburn, J.—*Godard* v. *Gray*).

Godard v. *Gray.* L. R. 6 Q. B. 139

With dicta so conflicting before us, it is impossible to lay down with certainty any rule upon the subject; to anticipate the decision of the Courts when the point comes expressly before them. A few suggestions only can be offered towards the solution of this most difficult question; premising only, that the possibility of the case arising —an illogical or erroneous conclusion from the facts of the case being apparent on the face of

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the record—is not so remote as might at first sight appear.

We will consider a simple illustration :— Illustrations.

The English Court is asked, let us suppose, to enforce a foreign judgment, upon the face of which appears the conclusion that 2 *plus* 2 equals 5.

Reimers v. Druce. 26 L. J: Ch : 196.

This is in illustration of the principle of *Reimers* v. *Druce* :—There is a conclusion from certain facts, so palpably erroneous, that no extrinsic evidence can possibly be needed to contradict it : again,

The English Court is asked, let us suppose, to enforce a foreign judgment, upon the face of which appears the conclusion that **x** *plus* **y** equals 5— **x** and **y** being unknown quantities.

Bk: of Australasia v. *Nias.* 20 L. J : Q. B. 284.

This is in illustration of the principle of the *Bank of Australasia* v. *Nias* :—There is a conclusion from certain facts ; but there is nothing upon the face of the judgment to shew that this conclusion is palpably erroneous. For all that the English Court can tell, it may be perfectly logical and accurate: it is in ignorance of the method pursued for arriving at the conclusion, and not being a Court of Appeal, it is not its business to enquire. The defendant indeed says that that conclusion is wrong, and that he will prove it to be wrong, shewing—by extrinsic evidence—that, say **x** was equivalent to 2, and **y** was also equivalent to 2 ; and that therefore **x** *plus* **y** cannot equal 5.

The answer of the English Court is evident. We cannot go into the merits of the case. If it is as the defendant says, that **x** *plus* **y** does not equal 5, that should have been proved in the Foreign Court. If he did endeavour to prove it there, he failed ; for that Court, having considered the evidence laid before it, has declared the correct conclusion from those facts to be, that **x** *plus* **y** equals 5. That decision is binding upon the defendant.

The principles of defence appear to conflict.

But the former case seems very different: The principles (i and ii) of negativing and excusing, conflict so with the principle (iii) of appeal; the case hangs so evenly between them, that without an express decision it is impossible to decide which applies: On the one hand there is that which should manifestly negative the existence of the legal obligation; or at least abundantly excuse the performance of it: On the other hand, to correct the apparent error, would be performing the functions of a Court of Appeal from the Foreign Court.

It may possibly be that the three principles are to be read together: thus, a defence is good, if it negatives or excuses, *so long as* the English Court does not, in entertaining it, become an Appeal Court:—if this be so, the last consideration would seem to preponderate to make the defence inadmissible.

Direct consequence of principle of Appeal.

The direct consequence of the principle of Appeal, is that nothing that could have been raised by way of defence in the Foreign Court, can be received in England as a defence to an action on the judgment.

B. *That the Foreign Court has made a mistake in the interpretation of its own law:*

Error in its own law.

that is, a mistake in the law *fori rei judicatæ*.

Preliminary proposition.

There appears to be no clearer proposition relating to the enforcement or recognition of foreign judgments than that the 'Foreign Judg-

Parke, B.

'ment is *prima facie* evidence of the law therein 'laid down'—(Parke, B.—*Alivon* v. *Furnival*). And

Alivon v. *Furnival.* 3 L. J: Ex: 241.

Cockburn, C.J.

the dictum of Cockburn, C.J., in *Munroe* v. *Pilkington* is to the same effect:—'It is enough that, being 'satisfied that the question of the defendant's 'liability must be determined by the *lex loci* of the 'contract, we have the decision of a local Court of 'Competent jurisdiction as to what that law is.'

Munroe v. *Pilkington.* 31 L. J: Q. B. 81.

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The proposition is still clearer, where the decision is one from which the unsuccessful party might have appealed in the Courts of Appeal of the Foreign Country, and he has not done so: in such a case 'the decision is about the best evidence 'you can have of the law of the country'—(Hayes, J., *Dent* v. *Smith*).

[qy: might *conveniently* have appealed.]

Hayes, J.

Dent v. *Smith.* L. R. 4 Q. B. 414.

The expansion of the proposition also holds good:—'The Foreign judgment must be assumed 'to be in accordance with the Foreign law'—(Lord Tenterden, C.J.—*Becquet* v. *M'Carthy*). Or;—'It 'must be presumed that the Foreign Court rightly 'interpreted and applied the Foreign law.'—(Sir R. Phillimore—*Messina* v. *Petrococchino.*)

Expansion of preliminary proposition.

Becquet v. *M'Carthy.* 2 B. & Ad. 951.

Ld: Tenterden, C.J.

Sir R. Phillimore.

Messina v. *Petrococchino.* L. R. 4 P. C. 144.

From these propositions the deduction easily follows:—that a foreign judgment, when it is brought into English Courts to be enforced or recognised, is not examinable on the ground of a mistake in the interpretation and application of its own law—(*Bank of Australasia* v. *Nias,* followed by Cockburn, C.J., in *Munroe* v. *Pilkington;* Romilly, M.R.—*Reimers* v. *Druce;* Lord Colonsay—*Castrique* v. *Imrie*).

Bk: of Australasia v. *Nias.* 20 L. J: Q. B. 284.

Cockburn, C.J.

Romilly, M.R.

Munroe v. *Pilkington.* 31 L. J: Q. B. 81.

Ld: Colonsay.

For the Foreign Court is much more competent to decide questions arising on its own law than our Courts can be—(Lord Tenterden, C.J.—*Becquet* v. *M'Carthy*).

Reimers v. *Druce.* 26 L. J: Ch: 196.

Ld: Tenterden, C.J.

Castrique v. *Imrie.* 30 L. J: C. P. 177.

The same result is arrived at by the aid of the general principles of defence:—The English Court, in making such an enquiry would be performing the functions of a Court of Appeal.

Application of general principles.

Meyer v. *Ralli.* L. R. 1 C. P. D. 358.

The case of *Meyer* v. *Ralli* remains to be considered. There had been a decree in France which was erroneous according to French law. The French Court had held that freight was due in its

Meyer v. *Ralli* considered.

entirety upon the cargo, as if the whole voyage had been completed, although from stress of weather the ship had been compelled to put in at a French Port, instead of proceeding to her destination. This decree came before the English Court in a special case; and the Court of Common Pleas, (Lord Coleridge, C.J., Grove and Archibald, JJ:) held that as the defendant was not a party to this judgment abroad, it was not binding upon him; and also that it was not binding on the Court on account of this mistake in the law *fori rei judicatæ*.

Archibald, J., in delivering the judgment of the Court, does not appear to have dealt with the general proposition that third parties are not bound by a judgment; but considered first, the proposition that a third party may attack a foreign judgment on the ground of error; and then proceeded to discuss the doctrine now before us:—the right of a party to a judgment to attack it on the ground of error in its own law:—'There is this peculiarity in 'the case, which does not, so far as we are aware, 'seem to have occurred before; that, upon the 'express findings in the special case, by which both 'parties are bound, this part of the judgment seems 'to be manifestly erroneous, in regard to the law of 'France, on which it professes to proceed.' Then follows a quotation from the judgment of Blackburn, J., in *Castrique* v. *Imrie*:—'We must (at least 'until the contrary be clearly proved) give credit 'to a foreign tribunal for knowing its own law, 'and acting within the jurisdiction conferred on it 'by that law;' and one from the judgment of Lord Tenterden, C.J., in *Becquet* v. *M'Carthy*:—'We 'ought to see very plainly that that Court has 'decided against the French law before we say that

Archibald, J.

Blackburn, J.

Castrique v. *Imrie*. 30 L. J: C. P. 177.

Ld: Tenterden, C.J.

Becquet v. *M'Carthy*. 2 B. & Ad: 951.

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'their judgment is erroneous on that ground.' From these dicta the conclusion is drawn, that if the mistake in the Foreign Law clearly appears, the English Court will not give effect to the judgment, not merely as in favour of a third party, but also as in favour of the original parties.

'Apparent' and 'proveable' error.

This decision points to the division into 'apparent' and 'proveable' error, which was adopted for the consideration of errors of fact: but it hardly goes the length of holding that an 'apparent' error in its own law will be a good ground for our Courts to refuse to be bound by the judgment; and that a 'proveable' error in its own law will not be a good ground: Indeed such a division in the case of foreign law appears to be useless; for it is hardly possible to imagine such an error to be 'apparent' in the sense in which this term has been used. The error may *become apparent*—as in this case, being set out in the special case—but the consideration of the error is a consideration of the means whereby the Foreign Court arrived at its decision; is a re-opening of the case as to its merits; and in following the decision of *Meyer* v. *Ralli*, it is with all respect and submission suggested, that an English Court would be acting against accepted principles, and would be constituting itself a Court of Appeal from the Foreign Court.

Meyer v. *Ralli*. L. R. 1 C. P. D. 358.

C. *That the Foreign Court has made a mistake in the interpretation of the law of another country, which it has professed to declare, and upon which the judgment is founded.*

Error in foreign law.

a. AN ERROR IN ENGLISH LAW.

The earlier opinion upon this point seems to have been, that if the judgment were not *in rem*, it

in English law.

Earlier opinion.

might be disregarded if a mistaken English law had been administered.

This was the decision of Wood, V.C., in *Simpson* v. *Fogo:* another example of this doctrine was there cited—*Novelli* v. *Rossi.* (Whether this case is an example or not seems doubtful; Blackburn, J., in *Godard* v. *Gray* denied its application.) But if as before, we here apply the preliminary principles, the same result is arrived at as in the preceding case of an error by the Foreign Court in its own law:—To open the judgment; to discover that the method by which the Court arrived at its conclusion was an application of English law; to ascertain what part of that law was applied, and the method of applying it, seems to belong entirely to the province of a Court of Appeal, and therefore not within the province of the English Court.

Simpson v. *Fogo.* 32 L. J: Ch: 249. *Novelli* v. *Rossi.* 2 B. & Ad: 757. *Godard* v. *Gray.* L. R. 6 Q. B. 139.

Application of preliminary principles.

This is the opinion of Lord Colonsay, in *Castrique* v. *Imrie*:—'We cannot enquire whether they 'were right in their views of the English Law.' In *Munroe* v. *Pilkington*, although the point was raised during the argument, the Court declined to give an opinion upon it, as it was not directly before them. But the proposition as laid down by the very learned author of Smith's Leading Cases in the original note to *Doe* v. *Oliver*—'It is clear that 'if the judgment appear on the face of the proceed- 'ings to be founded on a mistaken notion of 'English law, it would not be conclusive,'—drew from Lord Blackburn, in *Godard* v. *Gray*, that very strong expression of dissent that we have already noticed: and which applied not only to errors of fact, but to all other errors:—'Nor can there be 'any difference,' he adds to what has already been quoted (page 98), 'between a mistake made 'by a Foreign tribunal as to English law, and

Ld: Colonsay.

Castrique v. *Imrie.* L. R. 4 H. L. 414.

Munroe v. *Pilkington.* 31 L. J: Q. B. 81.

Opinion in Smith's Leading Cases.

Doe v. *Oliver.* 2 Sm: L. C. 816, 7th: ed:

Godard v. *Gray.* L. R. 6 Q. B. 139

Blackburn J.

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'any other mistake.' It is more than probable that the very learned Judge had in view the extreme improbability of an apparent error in English law arising: and it will be remembered that it was this consideration that led us under the head of 'Error in its own Law' (B), to discard the division of 'apparent' and 'proveable': the same course has been pursued in this case.

'Apparent' error.

Should the case of an 'apparent' error however arise; that is, should there be on the face of the proceedings a palpable error in English law, we need not consider whether *Novelli* v. *Rossi* is or is not an authority for Mr: Smith's proposition: the same considerations arise as in the case of an 'apparent' error of fact; and an express decision upon the point must be awaited.

Novelli v. *Rossi.* 2 B. & Ad: 757.

Extension of principle: Whether Court employed proper means to ascertain English law.

To this principle must be added an extension of it: No enquiry can be entertained as to whether, under the circumstances, the Foreign Court took the proper means of satisfying themselves with respect to the view they took of the English Law administered by them—(Lord Colonsay—*Castrique* v. *Imrie*).

Castrique v. *Imrie.* L. R. 4 H. L. 414.

It is the defendant's duty to see that the English Law is put properly before the Court. If it is not, he must take the consequences.

For example, the judgment will not be disregarded, although the Foreign Court too hastily concluded what the law of England was: *e.g.* that it must be what, according to their view, the law of every mercantile country ought to be—(Cockburn, C.J.—*Castrique* v. *Imrie*, in the Exchequer).

(in Exch: Ch:) 30 L. J: C. P. 177.

Wilful error.

In connection with this discussion, there remains one point which has often to be considered, whether the foreign judgment can be considered binding,

when the error in the English law has been *wilful;* when the Foreign Court has *knowingly and perversely* disregarded the English law: or, following Blackburn, J., in *Godard* v. *Gray*:—'When the 'Foreign Court has knowingly and perversely 'disregarded the rights given to an English subject 'by English law.'—

Godard v. *Gray.* L. R. 6 Q. B. 139.

Proper place for the discussion.

This discussion, though coming naturally in this place, seems to fall within the defence 'against Natural Justice': and it is as being against natural justice, that 'wilful error' is generally raised: but it will be found that that defence has been of necessity restricted to an enquiry into the nature of the *proceedings* in the Foreign Court: It has been thought better therefore to discuss 'wilful error' under the head of 'Fraud on the part of the Court.'

β. AN ERROR IN THE LAW OF ANY OTHER COUNTRY.

Error in the law of any other country incidentally involved.

The defence that the Foreign Court has made a mistake as to the law of some third country incidentally involved, cannot be raised; the same principles applying to this as to the preceding cases. (Blackburn, J., *Godard* v. *Gray.*) Thus Archibald, J., in *Meyer* v. *Ralli*:—'If this judgment '(of a French Court) had professed to declare what is 'the law of Austria, though equally wrong, we might 'have been bound by *Castrique* v. *Imrie* to give 'effect to it.'

Archibald, J.

Meyer v. *Ralli.* L. R. 1 C. P. D. 358.

Castrique v. *Imrie.* L. R. 4 H. L. 414.

D. *That the Foreign Court has made a mistake in its own course of procedure.*

Error of the Court in its own procedure.

Following the same principles that have guided us in the foregoing discussions, we must assume that the Foreign Court is best capable of knowing

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what its own procedure is; and that if the English Court enquires whether a mistake has been made in this procedure during the hearing of the case abroad, it will be acting as a Court of Appeal :— 'It appears to me that we cannot enter into an 'enquiry as to whether the Foreign Court proceeded 'correctly as to their own course of procedure.' (Lord Colonsay—*Castrique* v. *Imrie.*)

Ld. Colonsay.

III. Fraud on the part of the Court.

Cammell v. Sewell. 27 L. J. Ex. 447.

In the case of *Cammell* v. *Sewell* in the Exchequer, Martin, B., said that a foreign judgment might be avoided for fraud, which might be on the part of the plaintiff in procuring the judgment, or on the part of the Court itself. And, in *Castrique* v. *Imrie*, Blackburn, J., alsc recognises the possibility of there being fraud on the part of the Court.

Fraud of the Court.

Castrique v. Imrie. L. R. 4 H. L. 414.

Possibility of Fraud of the Court existing.

Although it is difficult to imagine in what this fraud could consist, yet wilful disregard of the English law by which the Foreign Court ought to have been guided, and which to a certain extent it recognised, is a defence frequently raised.

Since also it is possible that there may be a defence raised, of a wilful disregard of its own forms of procedure; of its own law; or of the merits of the case; it has been thought advisable to make 'Fraud on the part of the Court' a separate head of discussion; including under it 'wilful error' generally.

Possibility of wilful disregard of other matters.

Although in the cases reported, a wilful disregard of English law is the defence most frequently occurring; and although there appears to be no case at present decided, in which a wilful error in the other divisions of the preceding section has been

Authorities as to wilful error in English Law applicable to wilful

error generally.

raised; yet it is suggested that the authorities, although referring specifically to the former case, may, without any violation of the principles contained in them, be referred generally to the latter case; that is, to a wilful error in facts, law, or procedure.

For there does not seem to be any special ground for separating a wilful error in English law, from a wilful disregard of any other important element in the consideration of the case. The ground alleged for the one, is a violation of the general principles of Natural Justice: For the others, the ground can be no less a violation of those principles.

The defence '*wilful error*' generally, will therefore be considered by the aid of the authorities upon the defence 'wilful disregard of English law.'

Opinion in Smith's Leading Cases.

In Smith's leading cases, in the note to the Duchess of Kingston's case (p. 817) there is the following paragraph:—'There is considerable 'authority for saying, that where a judgment of a 'Foreign Court is given in perverse and wilful dis-'regard of the law of England when clearly and 'plainly put before it, though the law governing the 'case be that of England, it would not be enforced 'by the Tribunals of this country, though the de-'fect be not apparent on the face of the proceed-'ings.'

The authorities are as follows:—

Castrique v. *Imrie*. 30 L. J: C. P. 177.

Cockburn, C.J., in *Castrique* v. *Imrie* in the Exchequer, discussed the subject, but forbore giving any express decision upon it; he merely remarked,

Cockburn, C.J.

that if the fact were that the French Court 'knowingly and intentionally set the English law at 'naught, thereby violating the Comity of Nations '(by virtue of which alone the judgments of the 'tribunals of one country are respected by those of

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'another),' some members of the Court were strongly disposed to think that a *judgment in rem* could not be questioned: no opinion being expressed by them about a judgment *in personam*:—but on the other hand, that other members of the Court— 'if it could be shewn that, in a case in which the 'effect of a contract was to be determined by the '*lex loci contractus*, a Foreign Court perversely in- 'sisted on applying its own law, being in conflict 'with the former, thereby outraging the principles 'of International Comity in a manner amounting, 'in fact, to a species of judicial misconduct'—were by no means prepared to say that in such a case 'it 'would not be the duty of a Court in this country 'to refuse to recognise the binding effect of such 'a judgment; not indeed, by way of reprisal to- 'wards the foreign tribunal, but to protect our own 'fellow-subjects from injustice.'

Different opinions of members of the Court in *Castrique* v. *Imrie* in the Exchequer.

Wilful application of wrong law.

Castrique v. *Imrie.* (in H. L.) L. R. 4 H. L. 414.

In the same case before the House of Lords, Lord Hatherley also avoided any expression of opinion as to what might be done in such a case; saying only that 'it appeared in this case that the whole 'of the facts had been enquired into judicially, 'honestly, and with the intention to arrive at the 'right conclusion.'

Ld: Hatherley.

Simpson v. *Fogo.* 32 L. J: Ch: 249.

In *Simpson* v. *Fogo*, Lord Hatherley, then Vice-Chancellor Wood, said:—'Here is a case of a foreign 'judgment which distinctly states our law, and says 'that it diregards it, *giving reasons for so doing* 'which are entitled to great weight. I confess I 'yield to those judges constituting the Court in '*Castrique* v. *Imrie*, who considered that a perverse 'and deliberate refusal would justify our Courts 'from being bound by the foreign judgment, even 'though it were a judgment *in rem*.'

Wood, V.C.

It is not clear whether Blackburn, J., in *Godard* v. *Gray*, approves or disapproves of this principle.

Godard v. *Gray*. L. R. 6 Q. B. 139.

Application of general principles.

Now considering this point by the aid of the general principles; it is manifest that the performance of the obligation might reasonably be held to be excused by the wilful perversion by the Foreign Court of English law or of any other fact: The important consideration is therefore, will the English Court, in disregarding the judgment be acting as a Court of Appeal? and further, must this wilful error be apparent on the face of the record; or may it be proved by the defendant by extrinsic evidence?

'Apparent' and 'proveable' wilful error.

With regard to the latter question, a further consideration arises.

Reasons often appended to Foreign judgments. (cf: Mrs: Bulkeley's case. 1781

To Foreign Judgments are often appended the reasons which led the Court to the decision at which it arrived: We must ascertain whether these reasons form part of, and are to be received as, the judgment; or whether they are to be considered merely as appendages to it, for the information of the parties. In *Simpson* v. *Fogo* there were reasons appended to the judgment; and Wood, V.-C., said:

Simpson v. *Fogo*. 32 L. J: Ch: 249.

Wood, V.C.

—'I have clearly a right to look at these reasons as 'signed by the Judges, as part of the judgment, ap-'pearing as they do on the face of the record, like 'the *jugements motivés* of the French Judges.' If this be so, the English law and the reason for not following it, will very probably appear in the appended reasons; or the wilful disregard as to other points will be manifest in some way or other: and as they form part of the judgment, we have here a wilful mistake apparent on the face of the proceedings.

It will be remembered, that in the case of an apparent error of fact, it was found impossible to arrive at any definite conclusion; the case appear-

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ing to be exactly midway between the two principles of defence. The same difficulty exists here as to principle: the weight of authority however turns the scale in favour of refusing to acknowledge the Foreign judgment where there has been an 'apparent' wilful disregard. 'Apparent.'

If the wilful disregard is not 'apparent,' but merely 'proveable,' the excuse for non-performance of the obligation does not appear to exist in such a marked manner. The authorities seem certainly in favour of an application of the same doctrine: That is, that if the defendant raising by way of defence Error of the Court, suggest also that the error was wilful; the principles usually acted upon in the case of 'Error' will be waived, and the defendant will be admitted to proof of his defence:— It is suggested however that the most positive proof of the wilfulness of the error will be required, lest the English Court overstep the limits of their authority and act as a Court of Appeal. 'Proveable.'

In the case of a judgment *in rem*, we have had an expression of the opinion of some Judges, that this enquiry could not be permitted: the case of a judgment *in personam* must await an express decision. Judgment *in rem*.

It is essential that the defendant in establishing this defence should shew that, as to an error in English law, the law was clearly and plainly put before, and expounded to the Foreign Court; and as to any other error, that all the facts were laid before the Court; in other words, that the proof brought to establish the error before the English Court is not such as might and ought to have been raised as a defence to the action abroad. The fault lies with the defendant if the whole case, and all the law upon the case, is not before the Court; if Defendant to shew that English law was put before the Foreign Court.

in this respect he is in the wrong, the foreign Court cannot be said to have gone wrong wilfully and perversely.

A division of the subject suggested.

The following division of the subject may be suggested as tending to simplify the discussion :—first ;—errors which are not merely wilful, but where there exists also in the Court an intention of doing wrong ; as, from enmity with the country to which one of the parties is subject ; or from shere perversity : and secondly,—errors which are wilful, but where no intention of doing wrong can possibly be imputed to the Court ;—as, in cases where there really existed some doubt as to which law ought properly to be applied ; or where, as in *Simpson* v. *Fogo*, reasons are appended, and the Court has wilfully made the error in the exercise of its judicial discretion.

Wilful error with wrongful intent.

With no wrongful intent.

Simpson v. *Fogo.* 32 L. J: Ch: 249.

Defence attacking the integrity of the Foreign Court.

How far the defendant might impeach the *integrity* of the Foreign Court was a point suggested merely, but not considered by Lord Campbell, C.J., in the *Bank of Australasia* v. *Nias.* There is one case however in which this question was raised—*Price* v. *Dewhurst*, where the proceedings abroad took place in what is called the Executor's Court of Dealing in S. Croix. According to Danish law, where by a will certain people have been appointed incassators and guardians for other persons, they may form themselves into a Court for administering the property for the benefit of those persons. But it appeared that this Court had determined questions *for themselves ;* and on this ground the integrity of the Court was attacked : *not the Court itself* on account of its peculiar and unjudicial constitution,—for that was warranted by Danish Law ; and it is presumed that a decision of the Court relative to the persons over whom the Court had been

Bk: of Australasia v. *Nias.* 20 L. J : Q. B. 284.

Example in the Exors': Court of Dealing, in Danish Law.

Price v. *Dewhurst* 8 Sim: 279 —302.

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appointed guardian, would have been acknowledged; —but the *acts of this peculiar Court*; the act of determining a matter in which the members of the Court themselves were interested: (if this course had been warranted by Danish Law, Shadwell, V.C., thought that the question might be raised that it was contrary to the common course of Justice). The Vice-Chancellor said:—'It would be idle to 'say that we must pay attention to what took place 'in this case. Wherever it is manifest that justice 'has been disregarded, and that the parties are 'merely making use of legal proceedings as a matter 'of form, for the purpose of doing that which is con- 'trary to all notions of justice, viz:—of deciding for 'themselves, and in their own favour, the Court is 'bound to treat their decisions as a matter of no 'value and no substance. This Foreign Judgment 'is fraudulent and void.' *Shadwell, V.-C.*

From this decision it may be gathered that the integrity of the Foreign Court may be attacked on the ground of interest on the part of the Judges: for although this case deals more particularly with a *quasi*-judicial Court, the doctrine seems to apply also to the judges of regularly constituted Courts. Interest of the Judges.

Not only may the defendant attack the integrity of the Court, but from the judgment of the Vice-Chancellor it appears that the English Court is bound to take judicial notice of the fact, and disregard the judgment.

Mr: Wheaton's conclusions on the defences discussed in this section are: that, if it is clearly or unequivocally shewn by extrinsic evidence that it has manifestly proceeded upon false premises or inadequate reasons; or, upon a palpable mistake of local or foreign law, it will not be enforced. WHEATON.

Mr: Story's conclusions are somewhat similar (Conflict of Laws, § 607). STORY.

'It is easy to understand that the defendant may impeach 'the original justice of the judgment by shewing, that 'upon its face it is founded in mistake; or, that 'it is irregular and bad by the local law, *fori rei judicatæ*.'

['It cannot be impeached in England by shewing that the 'foreign Court has mistaken the law of England upon an 'English contract': § 607.

'But the Courts of England may disregard the judgment, '*inter partes*, if it is founded upon a misapprehension of 'what is the law of England: § 618*d*.] or that

'it proceeds upon a distinct refusal to recognise the laws 'of the country under which the title to the subject matter 'of the litigation arose.' § 618*d*.

Foreign decisions that have not been received by the English Courts.

It will be convenient to notice here certain foreign sentences, or *quasi*-judicial decisions, which have not been regarded in England.

Robinson v. *Bland*. 1 W. Bl: 234, 256.

Those of Fantastical Courts—such as a French Court of Honour. (*Robinson* v. *Bland*.)

Waldron v. *Coombe*. 3 Taunt: 162.

The certificate of a British Vice-Consul in a Foreign Country; or of any other non-judicial officer. (*Waldron* v. *Coombe*).

Gage v. *Bulkeley*. 3 Atk: 214.

The judgment of a French Commissary Court [or of any Foreign Court of a purely political nature]. (*Gage* v. *Bulkeley*).

Wolff v. *Oxholm*. 6 M. & S. 92.

Judgments proceeding on Penal Laws. *Ld: Ellenborough, C.J.*

Judgments proceeding on the PENAL LAWS of a country, or fixing on the person of the defendant some disability:—'For no country recognises the penal laws of another; they are strictly local, 'and affect nothing more than they can reach.' (Lord Ellenborough, C.J.—*Wolff* v. *Oxholm*. See also *Maule* v. *Murray*). So in *Folliott* v. *Ogden*, where a criminal sentence of attainder in America was held not to create a personal disability to sue in this country.

Maule v. *Murray*. 7 T. R. 470.

Folliott v. *Ogden*. 1 H. Bl: 124.

James v. *Catherwood*. 3 D. & R. 190.

Judgments proceeding on Revenue Laws.

Judgments proceeding on the REVENUE LAWS of a country:—*James* v. *Catherwood*—*Planché* v. *Fletcher*).

Planché v. *Fletcher*. 1 Dougl: 251.

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Nor, according to Mr: Westlake, can it be imagined that a foreign judgment sustaining a claim founded in a breach of the English Revenue Laws would be enforced here. (Conflict of Laws—§ 388.) This doctrine is based upon what has 'long been 'laid down as a settled principle, that no nation 'is bound to protect or to regard the revenue laws 'of another country. (Lord Mansfield, C.J.—*Holman* 'v. *Johnson*). A contract made in one country by 'subjects and residents there to evade the revenue 'laws of another country is not deemed illegal in 'the country of its origin.' (Story—Conflict of Laws, § 257.)

Westlake.

Story. § 257.

Ld: Mansfield, C.J.

Holman v. *Johnson.* 1 Cowper, 341.

This principle has been argued against strongly by Pothier, Kent, and others; and defended by Valin and Emerigon. 'It is, however,' adds Story, 'firmly established in the actual practice of modern 'nations; too firmly, perhaps, to be shaken, except 'by some legislative act abolishing it.'

IV. THAT THE PROCEEDINGS IN THE FOREIGN COURT WERE CONTRARY TO NATURAL JUSTICE.

The foreign proceedings against Natural Justice. Old opinion of defence 'against Natural Justice.'

There is an opinion to be found very generally expressed by learned Judges on the subject of Foreign Judgments, to the effect that if the judgment itself is, or the enforcing of it would be against the principles of Natural Justice, the English Courts will not give effect to it. For example, in *Buchanan* v. *Rucker*, Lord Ellenborough, C.J., said:—'The presumption may be in favour of a 'foreign judgment, if it appears on the face of it 'consistent with reason and justice': And Lord Kenyon, C.J., in *Calvert* v. *Bovill*:—'We presume 'the foreign sentences are just.' So also, in *Cowan* v. *Braidwood*, Maule, J.:—'A decree of a Foreign 'Court of competent jurisdiction must be presumed

Buchanan v. *Rucker.* 9 East. 192.

Ld: Ellenborough, C.J.

Calvert v. *Bovill.* 7 T. R. 523.

Ld: Kenyon, C.J.

Cowan v. *Braidwood.* 1 M. & G. 288.

Maule, J.

'not to be against Natural Justice.' And in *Price* v. *Dewhurst*, Shadwell, V.-C.:—'The question is 'whether this is not contrary to the common course 'of justice': and further, 'Wherever it is manifest 'that justice has been disregarded,—the Court is 'bound to treat the decision as a matter of no 'value and no substance.'

Shadwell, V.-C.

Price v. *Dewhurst.* 8 Sim: 279—302.

But this proposition is too large and too unwieldy to be of much service: So much would apparently be included in it, that it would be impossible to draw any line of demarcation. In the later cases the proposition has been narrowed so as to refer exclusively to a departure from natural justice in the proceedings of the Foreign Court. Thus in *Henderson* v. *Henderson*, Lord Denman, C.J., said:—'That injustice has been done is never 'presumed, but the contrary; unless we see in the 'clearest light the foreign law, or at least *some part* '*of the proceedings* of the foreign Court are repug-'nant to natural justice.' And Watson, B., in *Sheehy* v. *the Professional Life Assurance Co*:—'We 'can't inquire into the proceedings of another 'Court, except so far as we can see that they are 'contrary to natural justice.'

Channell, B. in arg: *Crawley* v. *Isaacs.* *Ld: Denman, C.J.*

Watson, B.

Crawley v. *Isaacs.* 16 L. T: N. S. 529.

Henderson v. *Henderson.* 13 L. J: Q. B. 274.

Sheehy v. *Professional Ass: Co:* 26 L. J: C. P. 301.

The proposition narrowed by *Bramwell, B.*

Finally, Bramwell, B., has reduced the proposition as to 'proceedings,' within what we venture to think are its proper and convenient limits:—'What 'this natural justice is,' he says in *Crawley* v. *Isaacs*, 'refers rather to the form of procedure than to the 'merits of the particular case. English Courts will 'not be concluded by proceedings not in accordance 'with natural justice: the remedy being given here 'because it would be useless to complain to the 'foreign Court; whereas if in accordance with 'natural justice, the foreign Court would itself 'interfere to prevent the plaintiff taking advantage

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'of the judgment irregularly and improperly 'obtained.'

This explanation of the learned Judge sets the case in the very clearest light. It would certainly seem to be a reasonable excuse for the non-performance of the legal obligation raised by the foreign judgment, that that judgment is against Natural Justice: but the field of enquiry that would be opened by such a defence would be immense; and in making such an enquiry the English Court would almost certainly trespass on the province of a Court of Appeal. Again, all the defences already considered,—the Plaintiff's fraud—the absence of jurisdiction in the Court—the Court's error—the Court's fraud,—might be included under this large head 'against Natural Justice.' Thus Mellish, L.J., in *Ochsenbein* v. *Papelier*:—'It has 'never been doubted that a foreign judgment could 'be impeached at law as being contrary to the 'principles of natural justice: *e.g.* no notice; want 'of jurisdiction; or fraud.'

Examination of broad doctrine.

Ochsenbein v. *Papelier*. L. R. 8 Ch: 695.

Mellish, L.J.

Were we therefore to admit the broad doctrine, that 'contrary to natural Justice' is a good defence, we should find a ready answer whenever the question is raised whether a defence be good or bad: For example;—The Foreign Court has based the judgment which is sought to be enforced, say, upon a misconception of English Law, which law it professed to take for its guidance, and which it interpreted, according to its lights, wrongly. Surely, the defendant would say, it is contrary to the principles of Natural Justice—contrary to the common course of justice—contrary to the eternal and immutable principles of justice—inconsistent with reason and justice—to enforce such a decision in the English Courts. But we have seen that the principles acted

The eternal principles of Justice.

upon by our Courts, require such a decision to be recognised and enforced; and that for the reason that by the Comity of Nations the English Court will not constitute itself a Court of Appeal from the Foreign Court.

In *Guinness* v. *Carroll*, Lord Tenterden, C.J., appears to have doubted whether he could enquire even if the principles of general justice had been infringed. *Guinness* v. *Carroll*. 1 B. & Ad: 459.

Of the later cases, besides *Ochsenbein* v. *Papelier*, there is only one that is not reconcileable with the doctrine of Baron Bramwell: *Shaw* v. *The Attorney-General*. The petitioner had been divorced in Scotland, in which country he had never had domicil or residence, and had never submitted himself directly or indirectly to the jurisdiction of the Court. Lord Penzance in his judgment said:— *Ochsenbein* v. *Papelier*. L. R. 8 Ch: 695. *Shaw* v. *A.-G.* L. R. 2 P. & D. 156.

Ld: Penzance. 'Besides being bad for want of jurisdiction; this 'judgment has the incurable vice of being contrary 'to Natural Justice.'

This case is considered more fully in the chapter on Divorce.

Baron Bramwell's proposition. Baron Bramwell's proposition may be stated to be: that a Foreign Judgment coming before the English Courts will not be recognised if it was obtained by proceedings—whether the regular course of procedure in the Foreign Court, or not—contrary to the principles of natural justice:—

Ld: Brougham. or, as Lord Brougham expressed it in *Don* v. *Lippman*, 'by a practice contrary to all principles of 'law.' *Don* v. *Lippman*. 6 Cl: & Fin: 1.

It is a good defence, because it is sufficient to excuse the defendant's obedience to the legal obligation raised abroad: and the English Court in entertaining this as an excuse will not be acting within the province of a Court of Appeal.

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Following this principle, Martin, B., in *De Cosse Brissac* v. *Rathbone*, held a plea bad, which alleged that the foreign judgment was erroneous in fact and in law on the merits, and that the enforcement of the judgment in England would be contrary to natural justice.

Brissac v. *Rathbone.* 30 L. J: Ex: 238.

Here then we have another form of the same proposition;—the enforcement of the judgment is not contrary to natural justice, because the judgment is erroneous: but it will not be enforced if it has been obtained by a procedure not in itself in accordance with natural justice.

Another form of the proposition.

In *Simpson* v. *Fogo*, Wood, V.C., made use of an expression which at first sight appears to be of larger meaning than 'natural justice':—'If you 'find a course of procedure there which is not 'recognised by any other country in the civilised 'world, our own citizens must be protected from the 'loss of their property which would be inflicted by 'decisions so arrived at.' The meaning intended to be conveyed however seems to be identical with that of the more usual expression 'Natural Justice.

Simpson v. *Fogo.* 32 L. J: Ch: 249.

An expression apparently larger than Natural Justice used by Wood, V.-C.

In *Alivon* v. *Furnival* the defence 'against Natural Justice' was raised; and it was suggested that a certain award was not warranted by the submission to arbitration. Parke, B., said:—'It is 'impossible for us to say that this principle of 'adjusting damages is wrong as being contrary to 'Natural Justice.'

Alivon v. *Furnival.* 1 D. P. C. 614.

Parke, B.

The case of 'wilful error' has been discussed under 'Fraud on the part of the Court' (page 107).

Wilful error.

We have now to consider what proceedings are, and what are not, against the principles of Natural Justice. Under the head of the Defendant's absence from the Foreign Court may be comprised

What proceedings against natural justice.

Defendant's absence.

most of the defences that are generally set up attacking the proceedings: in other words, that the Defendant was not before the Foreign Court, or was not a party to the action in which the judgment was pronounced, and was therefore condemned unheard.

Buchanan v. Rucker. 9 East, 192.

Lord Ellenborough, C.J., in *Buchanan* v. *Rucker*, gave vent to a general expression of opinion upon this point:—'It is contrary to the first principles of 'reason and justice, that in civil or criminal cases a 'man should be condemned before he is heard.'

Ld: Ellenborough, C.J.

Schibsby v. Westenholz. L. R. 6 Q. B. 155.

Blackburn, J., in *Schibsby* v. *Westenholz* declared that this part of the Lord Chief Justice's judgment was merely a declamation about the Island of Tobago:—Indeed such a general proposition is too large to be received; and 'the Courts at West-'minster in sustaining decrees of foreign Courts 'against absent persons have decided that in their 'judgment a decree may not be contrary to natural 'justice, although made against a party who is 'absent; for absence alone is not sufficient to in-'validate the proceedings.' (Maule, J., *Cowan* v. *Braidwood*).

Maule, J.

Absence alone not sufficient defence.

Cowan v. Braidwood. 1 M. & G. 288.

Division of subject.

The defendant's absence from the Foreign Court may be—

α. intentional, or,

β. unintentional.

Intentional absence.

α. Where the defendant's absence was intentional, and judgment has gone against him by default:

Subject to jurisdiction.

If he be subject in any way to the jurisdiction of the Court, and having had notice of the action, has intentionally allowed judgment to go against him by default, this defence of absence cannot be set up, and the judgment will be enforced.

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So also, if the defendant's absence is intentional, but *technically correct.* For instance, if he has had notice of the action, but not such notice as he ought in strictness to have had, absence will not be entertained as a defence. It must never be left an open question that he might have had sufficient notice so as to enable him to apply to the Court. (Tindal, C.J.—*Cowan* v. *Braidwood.*)

Technically correct.

No knowledge of action requisite.

Cowan v. *Braidwood.* 1 M. & G. 288.

In *Molony* v. *Gibbons*, Lord Ellenborough, C.J., held that an action might be maintained on a foreign judgment obtained by default, which stated that the defendant appeared by attorney but said nothing in bar.

Molony v. *Gibbons.* 2 Camp: 502.

In order to make a party an absentee, it is essential to prove that he has once been in the country: —'By persons absent from Tobago, must necessarily be meant persons who have been present within the jurisdiction.' (Lord Ellenborough, C.J., *Buchanan* v. *Rucker.* *Cavan* v. *Stewart.* Tindal, C.J., *Cowan* v. *Braidwood.*)

Definition of 'absence.'

Ld: Ellenborough, C.J.

Buchanan v. *Rucker.* 9 East, 192.

Cavan v. *Stewart.* 1 Stark: 525.

Presumably therefore the question mentioned above, whether the defendant *knew* of the action proceeding against him, cannot be raised in the case of a person who has never been in the foreign country; and that in his case the notice must be technically correct.

β. Where the defendant's absence is unintentional, and judgment has gone against him by default.

Unintentional.

i. The absence may be unintentional by reason of his not having been served with process.

Not served with process.

Ferguson v. *Mahon.* 11 A. & E. 179.

Lord Denman, C.J., in *Ferguson* v. *Mahon* held that a plea, 'that defendant was never served with 'nor had notice of any process in the action' was good: and that a reply, 'that defendant had notice 'of a writ of summons issuing out of the Court in

Ld: Denman, C.J.

'which judgment was obtained, for the cause of 'action on which such judgment was obtained' was insufficient, and clearly bad; for it did not shew that the process was at the suit of the plaintiff, or was in the action. This seems to coincide with the principle of knowledge being requisite; the plea falling short of shewing that the defendant did really know of the action.

The absence of notice, by reason of which the defendant was not properly before the Court, is perhaps the simplest illustration of the application of the principle now under consideration; and in *Ochsenbein* v. *Papelier*, Mellish, L.J., ranked it among other violations of the principles of natural justice.

Ochsenbein v. *Papelier*. L. R. 8 Ch: 695.

In the case of a non-resident defendant,—a subject of another country and not in any way under the foreign jurisdiction,—who has not been served with process, this defence becomes identical with absence of jurisdiction over the person, and as such is good (see *Ferguson* v. *Mahon*).

Ferguson v. *Mahon*. 11 A. & E. 179.

It is however most important to distinguish between this case and the following; and it will be seen, after a perusal of the next division, that the form of this defence is, that the defendant's absence was unintentional by reason of his not having been served with such notice as is required by the Foreign statutes for non-resident defendants.

The procedure against Natural Justice.

ii. The absence may be unintentional, where the defendant, not resident within the foreign jurisdiction, *has been served with process*, but only according to the practice of the Foreign Court.

Procedure against absent foreigners in France and other countries.

A practice obtaining in some countries abroad, where an action is brought against a non-resident foreigner, is somewhat as follows:—The summons is served on the Procureur-Générale. If the

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foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still at any time within two months after judgment appear and be heard on the merits; after that lapse of time the judgment is final and conclusive. *Blackburn, J.*, in *Schibsby* v. *Westenholz.*

The practice of the Government in France is in such a case to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this is not required by the French law, but is simply done by the Government voluntarily, from a regard to fair dealing. (Judgment of Blackburn, J., *Schibsby* v. *Westenholz.*)

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

In the Island of Mauritius the proceedings are similar, but the Procureur-Général or his deputy, though required to look after the interests of the absent party, is not required to communicate with him. (*Becquet* v. *M'Carthy.*)

Mauritius.

Becquet v. *M'Carthy.* 2 B. & Ad: 951.

There is another form of artificial citation known to the French Courts: a notice merely being affixed in some public office. (*Don* v. *Lippman.*)

Don v. *Lippman.* 6 Cl: & Fin: 1.

By the Belgian law, where there is a bill payable at a particular place, that place is considered the elected domicil of the acceptor, and process may be served there. (*Meeus* v. *Thellusson.*)

Belgium.

Meeus v. *Thellusson.* 22 L. J: Ex: 239.

[By the plaintiff's reply, relying on such law, it should clearly appear that it was the law, not only at the time of the acceptance, but also at the time of the recovery of the Judgment.]

Copin v. *Adamson.* L. R. 9 Ex: 345.

And in *Copin* v. *Adamson* we have another variation, which was provided by the articles of the Company and agreed to by persons taking shares:

Compulsory domicil of shareholder.

—'Any shareholder provoking a contest, must elect 'a domicil at Paris': if not, process is to be left for him at the office of the Procureur-Générale, as in the first method.

The question to be considered is, whether such a purely artificial form of procedure is in violation of the principles of Natural Justice: whether the defence in cases where this procedure has been followed, that the defendant did not appear; was not summoned; had no notice or knowledge of the proceedings; nor had any opportunity of defending himself, can be maintained.

Where this artificial process has been made use of, the defence set up in England is 'absence of notice'; If there has really been no knowledge of the action proceeding in the Court abroad, this is the only defence that can be made use of; but if there has been knowledge of the suit, and the process has not been served *personally*, the better course to pursue, if any hope is entertained of successfully attacking the procedure as being contrary to Natural Justice, would appear to be to raise that defence at once. The judgment of Maule, J., in the *Bank of Australasia* v. *Harding* is to this effect:—'You insist here on the absence of 'notice of process. But there is nothing in that 'contrary to Natural Justice, if there has been some 'other kind of notice: for example, a proclamation, 'or verbal notice.'

Maule, J.

Bank of Australasia v. *Harding.* 19 L. J: C. P. 345.

The *regularity* of the Judgment in such cases is usually admitted.

Conclusion as to a judgment founded on a Foreign Statute. cf: p. 91.

In discussing this question a former conclusion must be borne in mind:—If the judgment is obtained founded upon a statute passed by the Foreign State, which, on being considered here, is found not to be an unreasonable protection to be

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afforded by such Foreign State to its own subjects, nor at variance with the principles of Natural Justice, the English Courts will enforce it.

Is then, this artificial mode of citation at variance with these principles? In *Becquet* v. *McCarthy* Lord Tenterden, C.J., held that the Court could not take upon itself to say that the law upon which the foreign judgment had proceeded was so contrary to natural justice, as to render it void. And this decision was in the case where there was 'a 'deficiency in the law in not requiring the Pro-'cureur-Générale to communicate with the absent 'defendant.'

Becquet v. *M'Carthy* 2 B. & Ad. 951.

Ld. Tenterden, C.J.

In *Reynolds* v. *Fenton*, Maule, J., said:—'For 'aught we can tell the proceedings of the Court of 'Brussels may be regularly commenced by mere 'verbal notice without any regular process.'

Reynolds v. *Fenton*. 16 L. J. C. P. 15.

Maule, J.

It can easily be understood how difficult it is to deal with a defendant who is not within the territory of the country, and that some protection must be afforded to plaintiffs in the country, so that they should not be compelled to follow debtors into any part of the world where they may choose to reside: That the protection thus afforded by the State to its subjects should be very materially in the plaintiff's favour is not unreasonable, though at first sight it may appear arbitrary. In the case of the French process it might be said that the time given to the defendant should be lengthened; that instead of three months, it should be six months or even a year. That is a matter which must be left to the discretion of the legislature passing the Statute.

The difficulty in protecting plaintiffs against absent defendants.

A general rule deducible.

A general rule may however be deduced: That, so long as that discretion is exercised not unwisely, nor unreasonably, the Courts of this country will bow to the authority and jurisdiction which is

claimed by this Foreign government over English subjects:

Not making reciprocity a condition, but expecting a reciprocal recognition of its own Statutes:

This rule supposes therefore a power existent in all Courts of judging whether the discretion has been exercised, not wisely and reasonably, but, not unwisely and unreasonably; and also that all Courts, in their wisdom, will not overstep the limits of this power.

O. xi. r. 1.

We must notice here that the provision in Order XI. Rule 1 of the Judicature Acts for allowing service of the Writ out of the Jurisdiction, when the *breach* of contract occurred within the jurisdiction, wherever such contract was made, might be supposed to exceed the recognised principles of International Law.

Breach of the contract within the jurisdiction.

The provision was framed in accordance with the decision of the Common Pleas in *Jackson* v. *Spittal*, upon sections 18 and 19 of the Common Law Procedure Act, 1852, and which was ultimately assented to by the majority of all the Judges as the practice to be recognised by the three divisions of the High Court. (see *Vaughan* v. *Weldon*.)

Jackson v. *Spittal*. L. R. 5 C. P. 542.

Vaughan v. *Weldon*. L. R. 10 C. P. 47.

But whether it does exceed the recognised principles of International Law, or not, it is suggested that it is not an unreasonable exercise of the discretion vested in the English Legislature; and it is confidently believed that an English judgment proceeding on this order would be supported abroad.

Consideration of the general rule.

The general rule above enunciated leads us also to consider whether, the time allowed for the defendant to appear being unquestionably too short, the judgment would be recognised in England: as, that judgment by default might be signed at once, or within a day or two. The case of *Don* v.

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Lippman comes nearest to the point:—The appellant was an alien enemy, and could not appear in the French Courts. The notice of citation was affixed in a public office. Lord Brougham refused to enforce the French judgment, 'because the defendant was by force kept out of the action.'

Don v. *Lippman.* 6 Cl: & Fin: 1.

Ld: Brougham.

It would appear therefore that in extreme cases the English Courts will criticise the discretion exercised by the Foreign legislature, and will treat a judgment so obtained as of no effect.

Foreign judgments on laws not relating to procedure.

Nevertheless, the Courts avoid as much as possible reviewing the laws of another State; and a defence attacking the law (not of procedure) upon which the judgment is founded, as being contrary to Natural Justice is regarded with no favour. Thus Crompton, J., in *Cammell* v. *Sewell*:—'It does not appear to us that there is anything so barbarous or monstrous in the law, that we can say that it should not be recognised by us.' And in the same case, Cockburn, C.J:—'There is a good contract of sale in Norway without any evidence to show that by the general law of nations the sale valid in Norway can be invalidated elsewhere.'

Cammell v. *Sewell.* 29 L. J: Ex: 350.

Crompton, J.

Cockburn, C.J.

So in the *Liverpool Marine Credit Co*: v. *Hunter*, Cairns, L.C.:—'The Louisiana law does not recognise the transfer of chattels without delivery. In the argument, the law of Louisiana was treated as being itself contrary to Natural Justice: there is no such inherent injustice as absolutely to disentitle it to disregard when brought into question here. It is the application of it to foreigners that is open to the reproach of injustice.' In *Simpson* v. *Fogo*, also a case in which the law of New Orleans came before the Court, Wood, V.C., said that 'any peculiar legislation of foreign countries with regard to a special subject-matter (*e. g.*

Liverpool Cr: Co: v. *Hunter.* L. R. 3 Ch: 479.

Cairns, L.C.

Simpson v. *Fogo.* 32 L. J: Ch: 249.

Wood, V.-C., in *Simpson* v. *Fogo.*

'matters of prize) which has not been generally 'recognised or adopted, if it appears on the face of 'the record, is to be disregarded.' In reviewing this decision, the Lord Chancellor continued :—'It 'was therefore the application of the peculiar law 'of Louisiana to a case which by the Comity of 'Nations ought to have been excluded from its 'operation which makes the decision of Wood, V.C., 'in *Simpson* v. *Fogo*, quite correct.'

reviewed by *Cairns, L.C.*

cf. p. 89.

This decision coincides with the question suggested by Blackburn, J., in the hypothetical case of assumed jurisdiction in *Schibsby* v. *Westenholz*.

Schibsby v. *Westenholz.* L. R. 6 Q. B. 155.

Compulsory election of domicil by shareholder in Foreign Company.

Lastly, there is the case of the shareholder of a foreign company, being compelled by the articles of association to elect a domicil, in order that process may be left for him there; or, failing this, being subject to the law of the foreign country, and having to submit to the more artificial citation through the Procureur-Générale :—'There is no 'means of finding him out; therefore the law of 'France is reasonable in making him elect a 'domicil.' (Kelly, C.B.—*Copin* v. *Adamson*, in the Exchequer; see also *Vallée* v. *Dumergue*.)

Copin v. *Adamson.* L. R. 9 Ex: 345.

Vallée v. *Dumergue.* 18 L.J: Ex: 398.

English method of serving process out of the jurisdiction.

The English method of serving process on a non-resident defendant is an example of that discretion, which we have supposed vested in the Government of every State, being exercised wisely and reasonably; and we may suppose that a judgment obtained under this method would be supported in a foreign country whose Courts are governed by the same principles as our own.

The method is as follows :—

Order xi.

Rules 1 and 1*a* of Order XI. prescribe in what case notice of service out of the jurisdiction will be allowed to be given.

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Application for leave to give notice is to be made to the Court or Judge, and is to be supported by affidavits,—shewing clearly that the cause of action is one falling within rule 1 : by evidence ; or by any other means, from which the Judge may learn the whole facts connected with the case, and be able properly to exercise the discretion vested in him by rule 1*a*. No fixed limit is laid down in the rules, within which the defendant is required to appear ; but the order giving leave to give notice of service is to state the time for appearance, depending upon the place or country in which the defendant is to be found.

If the defendant does not appear within the time fixed, the plaintiff may 'proceed in the action, and judgment will be given in his absence.'

The plaintiff does not sign judgment by default, but the action proceeds in the usual way in the defendant's absence. The following are the rules upon the subject :—

ORDER II. *rule* 4.

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge. O. ii. r. 4. *Writ for service abroad.*

rule 5.

A writ of summons to be served out of the jurisdiction or of which notice is to be given out of the jurisdiction, shall be in Form No: 2 in Part 1 of Appendix (A) hereto, with such variations as circumstances may require. Such notice shall be in Form No: 3 in the same part, with such variations as circumstances may require. O. ii. r. 5. *Form of writ for service abroad.*

ORDER XI.

For rules 1 and 1*a*, see pages 88 & 89. O. xi. rr: 1 and 1*a*.

rule 2.

In Probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or Judge be allowed out of the jurisdiction. O. xi. r. 2. *Probate action.*

ORDER XI. *rule* 3.

O. xi. r. 3. *Affidavit to obtain leave.*

Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not and the grounds upon which the application is made.

rule 4.

O. xi. r. 4. *Time for appearance.*

Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

rule 5.

O. xi. r. 5. *Service of notice in lieu of writ.*

Notice in lieu of service shall be given in the manner in which writs of summons are served.

ORDER LIV. *rule* 2*a*.

O. liv. r. 2*a*. *District Registrars and Masters have no jurisdiction.*

The authority and jurisdiction of the District Registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons.

The reader is referred to the notes on these Orders in Wilson's Judicature Acts, and the cases there cited.

V. THE JUDGMENT CONTRARY TO INTERNATIONAL LAW.

The judgment contrary to International Law.

The defence relying on a breach of International Law is frequently raised: but the field of enquiry under this head is as large and unwieldy as that opened by the old defence 'against Natural Justice.' It has been found impossible to deal with it systematically; or to frame a general rule for the admission or rejection of the defence.

It has been thought advisable therefore to deal

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with the cases imputing a violation of International Law as they arise: these cases will be found under the following heads:—

Assumed jurisdiction over non-resident foreigners: especially by the English Courts under Order XI. rule 1.

Wilful error in English law.

Admiralty prize decisions.

Divorce.

Application to Sign Judgment under Order XIV.

Application to sign judgment under O. xiv. in action on foreign judgment.

In a case now proceeding—*Hubert* v. *Wallis*—an application was made at Chambers by the Plaintiff for leave to sign judgment under Order XIV.; it being an action on a judgment of a French Tribunal, affirmed by the Court of Appeal of the district.

Field, J., refused to make an order, on the ground that the defendant had not been served with notice.

Application of the general theory.

In such an application, it seems that the first question to be considered is whether a foreign judgment comes within the terms of Order III. rule 6—'a debt or liquidated demand in money 'payable by the Defendant, with or without interest, 'arising upon a contract express or implied';—and it is with submission suggested, that an action on a foreign judgment not being an action to recover what is a debt in this country, such an application cannot be entertained.

Statutes of Limitation.

Consideration whether English Statute

The consideration whether in an action on a foreign judgment, the English Statutes of Limitation may be pleaded, involves two questions of some difficulty:

may be pleaded to foreign judgment.

i. From what period is the time to be calculated?
ii. What length of time bars the action?

What period time to run from?

According to the words of the Statute, the 'cause of such action' appears to be the foreign judgment, and this being so, the time would run from the date of such judgment: but it may also be said, that the 'cause of such action' is the plaintiff's coming into this country; or even the exercise of his discretion in calling into action the latent auxiliary sanction resident in the English Sovereign Authority: in the former case, some difficulty would arise in fixing the precise period of his arrival here: in the latter case, the question under the Statute could not be raised.

What is to be the limiting period?

But supposing the time to run from the date of the foreign judgment, is the limiting period to be twenty years as on an English judgment (*Watson* v. *Birch*); or six years, the judgment being treated as a simple contract debt?

Watson v. *Birch.* 15 Sim: 523.

In two old cases indeed—*Dupleix* v. *De Roven* and *Atkinson* v. *Lord Braybrooke*—it has been held that a foreign judgment, when it comes before the English Courts, is nothing but a simple contract debt: but, in accordance with the general theory, it is suggested that the idea of a debt cannot be entertained in the slightest degree, and that, if the English Statute can be pleaded, the limit must be twenty years as on an English judgment: for in *Watson* v. *Birch*, Shadwell, V.-C., expressly held that the twenty years ran on an English judgment under 3. & 4. Will: IV. c. 27. s. 40, and that there was 'nothing in the word judgment 'as there used to confine its meaning to a judgment 'which, owing to the nature of the assets of the 'party indebted, might affect land, but could not 'operate on personalty.'

Dupleix v. *De Roven.* 2 Vern: 540.

Atkinson v. *Braybrooke.* 4 Camp: 380.

Shadwell, V.-C.

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From the discussion on judgments abroad proceeding on foreign statutes of Limitation, it is clear that a defence setting up a Foreign Statute of Limitation as having extinguished the time within which the foreign judgment might have been sued upon abroad, is bad.

Defence setting up Foreign Statute bad.

NUL TIEL RECORD.

It will appear from what has been advanced in the first chapter, that, as in the case of an English judgment the opposite party may put the existence of the record itself in issue, so in the case of a foreign judgment, the non-existence of the judgment may be set up.

The old plea *nul tiel record.*

Walker v. *Witter.* 1 Dougl: 1.
Philpott v. *Adams.* 31 L. J: Ex: 421.

It was held however in *Walker* v. *Witter* and *Philpott* v. *Adams*, that the old plea *nul tiel record* was bad in an action on a foreign judgment; but these decisions proceeded on the ground that a foreign judgment was not equivalent to, and was not properly called, a record. Now that technical pleas have been abolished, it is suggested, that the defendant will be entitled in his statement of defence to deny the existence of the judgment, thereby putting the plaintiff to strict proof under 14. & 15. Vic: c. 99. s. 7.

INTEREST ON A FOREIGN JUDGMENT.

Interest on foreign judgment to be regulated by rules of foreign country.

Interest on a foreign judgment must evidently be regulated by the rules of the foreign country in which the judgment was pronounced. If interest is given abroad on the judgment, whatever the rate may be, it becomes an integral part of the foreign debt to enforce which the action is brought in the English Courts; if no interest is given by the

foreign law, none can be recovered here: the question depends entirely on the foreign law, which will have to be proved upon this point in the usual manner.

This is in accordance with *Arnott* v. *Redfern* and *Douglas* v. *Forrest*.

Arnott v. *Redfern*. 3 Bing: 353.

Douglas v. *Forrest*. 4 Bing: 686.

Interest awarded by foreign Court can be recovered.

So too, if by the foreign judgment, interest has been given on the contract which was the foundation of the action, that interest will be recoverable. In *Arnott* v. *Redfern* it was contended that, as the contract which was the foundation of the action in which the foreign judgment had been given, was made in England, and was a contract upon which no interest would be allowed by our law, the Court was not bound by that part of it which awarded interest: but Best, C.J., held that this argument could not be maintained.

What rate after English judgment pronounced?

The only difficulty appears to be when the English Court by its judgment gives effect to the foreign judgment: Is the after-accruing interest to be governed by English or Foreign law. We must revert to the general theory:—The creditor is no longer to be considered as *electing to treat the foreign judgment as a debt in England*; were he able to do so, undoubtedly the English rate would run on the English judgment:—but the creditor in reality takes advantage of a Comity by which one State exercises its power of enforcing an obligation for the advantage of another State; the judgment of the Court is the act of clothing with power the judgment of the foreign Court, inoperative beyond its own jurisdiction;—it seems therefore to be a natural consequence that the rate of interest, according to the Foreign law, should continue to accrue.

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COSTS.

Costs awarded by foreign Court can be recovered.

If the Foreign Court by its judgment has awarded costs to the successful party, they also become an integral part of the foreign debt to enforce which the action is brought in the English Courts, and as such can be recovered.

Russell v. *Smyth.* 9 M. & W. 810.

This is in accordance with *Russell* v. *Smyth.*

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NOTE.

It is impossible to attach too much importance to the consideration involved in almost every section of the Chapter on Defences,—that one Court of Justice must of necessity presume another Court of Justice, irrespective of its nationality, to have acted well and justly:—and that 'judicial misconduct' therefore is sufficient to excuse the performance of the legal obligation. This is entirely consistent with the result that must be apparent from the discussion upon absence of the Court's jurisdiction over the person, that the general proposition is in effect reduced in its application to some case of judicial misconduct, or negligence.

The cases in which the jurisdiction over the person cannot be attacked, are; primarily, those where the Foreign Court has no need of assuming jurisdiction, that having been already granted to it by the Courts of the defendant's country, acting upon the principles of International Law, or of general justice; and secondarily, those where the Foreign Court has assumed jurisdiction, not necessarily in accordance with the principles of International Law, but rather with those of general justice, which are sufficiently large to admit of a free yet just use of the discretion vested in the Foreign Legislature.

Now the case of 'judicial misconduct' that perhaps suggests itself most naturally is, where a man abroad with a purely fictitious cause of action, makes such affidavits as may be necessary to establish his claim, and the Foreign Court, aiding and abetting him, or simply shutting its eyes, and acting negligently does not conform to its own procedure; and without giving even that

meagre notice which some Foreign Countries require, allows the plaintiff to sign judgment by default. Should he bring his judgment to England, and endeavour to enforce it,—not being within any of the exceptions to the general rule, and the Court not having assumed jurisdiction in conformity with its own law, the defence of absence of jurisdiction could be successfully sustained. But, it is absolutely necessary to assume, if the Foreign Court *has* put its artificial process into operation, thereby assuming jurisdiction over the absent defendant, that it has required sufficient evidence—or rather that the law of the country has declared so much evidence to be necessary as to compel the plaintiff to establish at least a *primâ facie* cause of action, upon which, if the defendant does not appear, he may justly be allowed to sign judgment by default.

One other case only need be mentioned ;—where the plaintiff has wilfully kept back from the Foreign Court the fact that the defendant is not resident within its jurisdiction, and he has thereby been enabled to obtain judgment by default: but this falls within the good defence of unintentional absence, through not having been served with process : This is the case suggested by Crompton, J., in *Castrique* v. *Behrens*: where, 'by the contri-'vance of the plaintiffs, the proceedings were such that the 'defendant had no opportunity to appear in the Foreign Court 'and dispute the allegations.'

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CHAPTER III.—JUDGMENTS IN REM.

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WE have hitherto confined our attention solely to judgments *in personam:* there remain to be considered judgments *in rem.* These are 'judgments 'determining the *status* of the chattel with reference 'to property, or vesting the property at once in the 'claimant as a condemnation of the Court of Ex- 'chequer in a revenue cause vests the property in 'the Crown, or a sentence of a Court of Admiralty 'in a matter of prize vests the property in the 'Captors.' (Cockburn, C.J. — *Castrique* v. *Imrie.*) From a judgment *in rem*,—which may be given in a suit on a cause of action arising out of the violation of either a *jus in rem* or a *jus in personam*,— there results to the successful claimant a *jus in rem;* that is, the property is vested in him as against everybody else; or, using the more common expression, as against all the world; which evidently must be taken to mean, as against all the world subject to the English Courts, or to become subject to them, by a violation of the right within the jurisdiction of the English Courts:—[This is of larger application than Mr: Markby's definition, 'against 'all persons, members of the same political society 'as the person to whom the right belongs.'] In other words, the Court having considered the merits of the case, has vested the property in a certain person; and the right to this property, all other Courts under the same Sovereign Authority, will protect, should it be called in question by anyone.

Definition. *Cockburn, C.J.*

Castrique v. *Imrie.* 30 L. J: C. P. 177.

Jus in rem resulting from judgment *in rem.*

Markby's definition.

Now, from a judgment *in personam* there results only a *jus in personam*: This right also is *in* a certain person, but it is in him only as against one particular and definite person, (or particular and definite persons, or their representatives): To this *jus in personam*, there is a correlative obligation; The sanction attaching to the obligation is resident in the

Differences between *jus in rem* and *jus in personam.* resulting from judgments.

Jus in personam.

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Sovereign Authority of the State: But it is only when the subject of this obligation—a party to the original action—attempts to call this right in question, that the Courts will consider the right as established by the first adjudication, and will not reopen the merits of the case. When the right is considered as established.

But to the *jus in rem* resulting from a judgment *in rem* there is also a duty correlative—the duty is negative—to abstain from violating the right declared to exist. Obedience to this duty is incumbent upon everybody; and this, from the very nature of the right: The decision of the Court is that the right to the thing is in a certain person only, and in no one else: To this *jus in rem* there is a correlative duty—to which no definite name, as opposed to 'obligation' has been given:—and as before, the sanction attaching to it is resident in the Sovereign Authority of the State. *Jus in rem.* The duty correlative.

We arrive at a result similar to that arrived at in the case of judgments *in personam*:—When any one, a subject of this duty—(that is, any one within the jurisdiction, everybody having been parties to the original action; the citation to all the world being in effect artificial, and being recognised as sufficient notice to all, or any, having any claim to make to the goods)—attempts to call this right in question, the Courts will consider the right as established by the first adjudication, and will not reopen the merits of the case. When the right is considered as established.

The judgment *in personam* is therefore a special case of the judgment *in rem*.

So far we have considered the English recognition of a judgment *in rem* pronounced by an English Court: we will proceed to the case of a judgment *in rem* pronounced by a Foreign Court. Foreign Judgment *in rem.*

Recapitulation: conclusion as to judgment *in personam.*

The conclusion arrived at in the first Chapter was, that in addition to the obligation and sanction resident in the Sovereign Authority which arose upon a judgment *in personam*, there also came into being in every other state a bare obligation—resembling somewhat the *nudum pactum* of the Roman Law—which, when the subject of the obligation enters any Foreign State, the Sovereign Authority of that State, clothes with an auxiliary sanction, enforceable at the instance and discretion of the foreign judgment creditor: This sanction being founded upon the principles of International Comity.

Parallel conclusion as to judgment *in rem.*

So, in addition to the negative duty and sanction resident in the Sovereign Authority which arise upon a judgment *in rem*—obedience to which is obligatory upon all the world subject, or to become subject to that Sovereign Authority—there also comes into being in every other state, a bare negative obligation; which, when the person possessing the right *in rem* enters any Foreign State, the Sovereign Authority of that State will, at his instance and discretion, clothe with an auxiliary sanction, when any subject of the duty (a subject of the Foreign State) disobeys that duty, by violating the right. This sanction being founded upon the principles of International Comity: For, when that subject comes within the State whose Courts have created the right, the bare negative obligation would instantly become the absolute negative duty, and would be enforced by its correlative sanction resident in the Sovereign Authority.

The parallel continued. Judgments *in personam.*

Again, before the Courts of the Foreign State, at the instance and discretion of the possessor of the right *in personam*, clothe with this international auxiliary sanction the bare obligation consequent

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upon a judgment *in personam*, the subject of the obligation may negative its existence, or excuse the performance of it;—so, it follows that,

Before the Courts of the Foreign State, at the instance and discretion of the possessor of the right *in rem*, clothe with this international auxiliary sanction, the bare negative obligation consequent upon the judgment *in rem*, as against any subject of the negative duty,—(the subject of the Foreign State who has disobeyed that duty by violating the right *in rem*)—that subject may negative the existence of that negative duty, or may excuse his disobedience to it. Ultimate conclusion as to judgments *in rem*.

That is to say, a foreign judgment *in rem* may be met with the same defences that may be raised to a judgment *in personam*: The difference between the two classes of judgments being, that whereas third parties are entitled to have a judgment *in personam* entirely disregarded as against themselves; they are bound by a judgment *in rem*, so far absolutely, as that they can do no more than negative the existence of the duty imposed by it. Real distinction between judgments *in rem* and *in personam*.

This is the theoretical view of the case: we must now examine how far this view is supported by authority.

It will be convenient to consider the subject under the following heads:— Division of the subject.

A. Judgments referring to land or immoveables.
B. Admiralty decisions in matters of prize.
C. Admiralty decisions not in matters of prize.
D. Condemnations of Exchequer Courts.

A. Foreign Judgments referring to land or immoveables.

In all cases where the matter in controversy is Judgments

referring to land or immoveables. *Story.* § 591.

land, or other immoveable property, 'the judgment 'pronounced in the forum *rei sitæ* is held to be of 'universal obligation, as to all matters of right and 'title which it professes to decide in relation thereto. 'This results from the very nature of the case; for no 'other Court can have a competent jurisdiction to 'inquire into or settle such right or title. By the 'general consent of nations, therefore, in the case of 'immoveables, the judgment of the forum *rei sitæ* 'is held absolutely conclusive.' (Story—Conflict of Laws, § 591.)

DEFENCES. To apply the theory of defence:—

JURISDICTION. The jurisdiction of the Court cannot be attacked; for the subject of the action is necessarily within the jurisdiction: It is impossible therefore to negative the existence of the duty: In what manner can the disobedience to it be excused? We are here guided by authority:

FRAUD. Fraud may be set up:—'Fraud is an extrinsic, 'collateral act: which vitiates the most solemn pro- 'ceedings of Courts of Justice.—Lord Coke says, 'it avoids all judicial acts, ecclesiastical or tem- 'poral.' (Sir William de Grey, C.J.—*Duchess of Kingston's case.*)

De Grey, C.J.

Duchess of Kingston's case. 2 Sm: L. C. 770.

The Fraud, as in the case of judgments *in personam* may be either on the part of the plaintiff, or of the Court.

ERROR. Error on the part of the Court was found to be a bad defence to a judgment *in personam*, and therefore bad also as a defence to a judgment *in rem.*

Two cases were considered doubtful: 'apparent 'error' and 'wilful error.' The doubt also exists here and will remain, till there is an express decision by the Courts.

NATURAL JUSTICE. Lastly, that Natural Justice has been violated

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by the proceedings in the Foreign Court, was found in the case of judgments *in personam* to reduce itself almost entirely to the consideration of the peculiar method of citation used for absent defendants:—In the case of judgments *in rem*, as regards the actual parties to the foreign action, the considerations are the same; as regards third parties, from the nature of the case, this defence cannot be raised, for the citation being to all the world, is of necessity an artificial one.

Thus, although the judgment is conclusive 'by 'the general consent of nations,' the principle is in strict accordance with the Theory advanced.

Converse case.

The converse case is where a judgment has been pronounced in any country, referring to lands or immoveables in any other country.

Story. § 591.

'On the other hand,' Story continues, 'a judg- 'ment in any Foreign Country, touching such im- 'moveables, will be held of no obligation.' For the Court had no jurisdiction over the subject matter of the action; therefore the existence of the duty may be at once negatived, by attacking the jurisdiction of the Court.

B. Admiralty decisions in matters of prize.

a. As regards underwriters.

Effect of Admiralty decisions in cases between assured and underwriters.

In time of war, Foreign Admiralty decisions in matters of prize very frequently came before the English Courts. Nearly all the cases cited will be found to have arisen in the early part of this century, during the wars between England and France. The condemnations of the Foreign Court were usually made use of in actions between the assured and the underwriters: The owner of the

captured vessel claiming the amount of the insurance: The underwriters alleging a violation of the warrant of neutrality in the policy, and producing the foreign condemnation as proof.

The Foreign Condemnation produced.

The Foreign Condemnation, determining the *status* of the vessel with reference to property, is a judgment *in rem*, and vests the property in the captors:—we must inquire how far the authorities accord with the principles of the general theory.

DEFENCES.

The non-existence of the negative duty may be shewn by the party against whose property the judgment was pronounced, by attacking the

JURISDICTION.

Jurisdiction of the Foreign Court.

As in the case of *The Huldah*, in 1801: which was one of several cases of ships and cargoes carried into S. Domingo, and proceeded against in a Court of Admiralty which was held not to be vested with competent authority to proceed in prize causes. In consequence of that mistake, original proceedings were instituted in the High Court of Admiralty on the petition of the claimants, by a monition calling on the captors to proceed to adjudication. Sir William Scott held, that although the Court had apparently authority, and distribution had taken place; yet, it not having authority, the proceedings were null and of no legal effect whatever. *The Huldah.* 3 Rob: A. R. 235.

Admiralty Courts to condemn only within territory of belligerent.

The judgment of condemnation must evidently be by the courts of the belligerent power, within their own territory. Such a sentence therefore, pronounced by a Court of Admiralty sitting under a commission from a belligerent power in a neutral Country will not be regarded:

As in the case of *Donaldson* v. *Thompson*: where a Russian Court sitting at Corfu pronounced the condemnation: and similarly in the case of the *Donaldson v. Thompson.* 1 Camp: 429.

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Flad Oyen: where a ship was taken by a French Privateer and carried into Bergen, she underwent there a sort of process ending in the sentence of condemnation by the French Consul. Sir William Scott characterised this as 'a licentious attempt of 'the French Consul to exercise the rights of war 'within the bosom of a neutral country, where no 'such exercise has ever been authorised.' This decision was followed in *Havelock* v. *Rockwood*.

The Flad Oyen. 8 T. R. 270n.

Sir W. Scott.

Havelock v. *Rockwood.* 8 T. R. 277.

From the judgments of Lord Ellenborough, C.J., in the first case, and of Sir William Scott in the *Flad Oyen*, some important principles may be gathered.

NEUTRALITY.

General principles of neutrality.

'That country is to be considered neutral in 'which the forms of an independent neutral 'government are preserved, although the belligerent has troops there as in reality to possess the 'Sovereign Authority.'

Ld: Ellenborough, C.J.

'The Russians were visitors at Corfu, and not 'Sovereigns. While a government subsists as this 'did at Corfu, we can't look to the degree in which 'it might be overawed by a foreign force.'

But if the country has become a co-belligerent by enduring a hostile aggression,—that is, has been overawed,—the condemnation pronounced there will be received. (*Donaldson* v. *Thompson.*)

Donaldson v. *Thompson.* 1 Camp: 429.

'The rule is, that the *res* should be in the ports 'of the belligerent nation: very few deviations 'have taken place from this: much more ought the 'Court adjudging prize causes to be there.

Sir W. Scott.

'The case might be altered if there were a treaty 'to make the place of adjudication a port of the 'belligerent country: but even then there would 'be much doubt.'

'A neutral country has no cognisance whatever, 'except in the single case of an infringement of its 'own territory.'

The necessity of such a rule is evident: if there were no such rule, every port of every nation would become a port of condemnation. (*The Flad Oyen.*)

The Flad Oyen. 8 T. R. 270n.

The remarkable words of Lord Ellenborough as to the general principle of receiving these condemnations must be here noticed:—'I am by no 'means disposed to extend the Comity which has 'been shewn to these sentences of Foreign Admi- 'ralty Courts. I shall die, like Lord Thurlow, in 'the belief that they ought never to have been 'admitted. The doctrine in their favour rests on '*Hughes* v. *Cornelius*, which does not fully support 'it; and the practice of receiving them often leads 'in its consequences to the grossest injustice.'

Ld: Ellenborough, C.J.

Hughes v. *Cornelius.* 2 Sm: L. C. 773.

FRAUD. The second defence to be considered is Fraud.

The question of fraud does not appear ever to have been raised: and it is somewhat doubtful in what manner it could arise: Should the question however come to be discussed, there can be no doubt that the judgment of De Grey, C.J., in the [page 146] Duchess of Kingston's case, cited above, would apply to foreign condemnations; and that fraud, either of the parties or of the Court, would render the sentence void:—Parke, B., in the argument in *re Place*, where an English judgment *in rem* had been produced, said that fraud might be set up against it.

re Place. 22 L. J: Ex: 241.

NATURAL JUSTICE. The remarks as to the defence against Natural Justice in the case of judgments referring to land, apply to Admiralty prize decisions.

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The effect of these decisions must now be more fully considered.

'These sentences are admissible and conclusive 'between the assured and the underwriters with 'respect to every fact which they profess to decide.' (Lord Alvanley, C.J., *Baring* v. *Clagett.*) The question between the assured and the underwriters is: Has the warrant of neutrality been violated? Was the ship at the time of her capture doing such things as a neutral vessel might do? The underwriters produce the condemnation of the Foreign Prize Court: if therefore this sentence says absolutely, that the vessel was not neutral; that is, that it was enemy's property; or that she was doing such things as would render her liable to be treated as enemy's property, it will be received as answering the question in favour of the underwriters.

Ld: Alvanley, C.J.

Baring v. *Clagett.* 3 B. & P. 201.

Question between assured and underwriters.

The right of the underwriters to produce the sentence was questioned in *Lothian* v. *Henderson.* The majority of the Judges held that they were clearly entitled to do so.

Lothian v. *Henderson.* 3 B. & P. 499.

In *Marshall* v. *Parker,* Lord Ellenborough, C.J., held that it was necessary to lay a foundation for the sentence, by proving that the vessel was captured: till that had been done, the sentence was merely *in vacuo*:—And in *Von Tungeln* v. *Dubois* the same learned Judge decided that a ship being merely *represented* neutral, there was no *warrant* of neutrality; and that therefore a condemnation for a violation of the laws of neutrality, was not evidence to falsify the representation.

Marshall v. *Parker.* 2 Camp: 69.

Von Tungeln v. *Dubois.* 2 Camp: 151.

As to the difference between a representation and a warrant of neutrality,—cf: Marshall on Insurance. 4th ed: p. 346.

'Enemy's property.'

The first conclusion at which we arrive is therefore; *If the ground of condemnation be clearly set forth to be that the ship is enemy's property*, it will be held conclusive.

Cases.

Bernardi v. *Motteux*.[1] Lord Mansfield, C.J.
Calvert v. *Bovill*.[2] Lawrence, J.
Geyer v. *Aguilar*.[3] Lord Kenyon, C.J.
Christie v. *Secretan*.[4] „
Pollard v. *Bell*.[5] „
Kindersley v. *Chase*.[6] Sir W. Grant, M.R.
Baring v. *Clagett*.[7] Lord Alvanley, C.J.
Lothian v *Henderson*.[8] Le Blanc, J.
Chambre, J.

[1] 2 Dougl: 575.
[2] 7 T. R. 523.
[3] 7 T. R. 681.
[4] 8 T. R. 192.
[5] 8 T. R. 434.
[6] Park on Insurance 8th ed: 743.
[7] 3 B. & P. 201.
[8] 3 B. & P. 499.

'Enemy's property' not stated.

The next consideration is, where the ground of enemy's property is not clearly set forth: nothing appearing but the mere condemnation.

Authorities in favour of inference being made.

There is a conflict of authority as to the conclusiveness of the sentence.

Ld: Eldon, L.C.

In *Lothian* v. *Henderson*, Lord Eldon, L.C., said: 'The question would be whether such sentence of 'condemnation must not be presumed to have been 'founded on the only legitimate ground on which 'they can be founded, viz:—the property not being 'neutral but hostile.' And in *Pollard* v. *Bell*, Le Blanc, J., said:—'If there be a general sentence of 'condemnation, without assigning any reason, the 'Courts here will consider that it proceeded on the 'ground of the ship's being the property of an 'enemy.' In *Bernardi* v. *Motteux*, Lord Mansfield, C.J., appears to have doubted whether the inference should be made: he remarked that the 'inconvenience would be entirely obviated if the foreign 'Courts would say in their sentences,—condemned 'as enemy's property'—but in a later case, *Saloucci* v. *Woodmas*, he held that the ship being condemned

Le Blanc, J.

Ld: Mansfield, C.J.

Lothian v. *Henderson*. 3 B. & P. 499.

Pollard v. *Bell*. 8 T. R. 434.

Bernardi v. *Motteux*. 2 Dougl: 575.

Saloucci v. *Woodmas*. Park on Insurance, 8th ed: 727.

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as 'good and lawful prize,' it must have proceeded on the ground of the property belonging to an enemy.

Dalgleish v. *Hodson.* 7 Bing: 495. *Fisher* v. *Ogle.* 1 Camp: 418.

Tindal, C.J., in *Dalgleish* v. *Hodson*, and Lord Ellenborough, C.J., in *Fisher* v. *Ogle*, are entirely against this inference being made.

Authorities against the inference being made.

The last consideration is where grounds other than 'enemy's property' are set forth :—

Other grounds.

Of these the first to be noticed is,

VIOLATION OF TREATIES :—'We should not be 'able to extricate ourselves from the effect of such a 'sentence.' (Lord Kenyon, C.J., *Christie* v. *Secretan.*)

Violation of Treaties. *Ld: Kenyon, C.J.*

Christie v. *Secretan.* 8 T. R. 192.

A most common ground of condemnation appears to have been,

VIOLATION OF ORDINANCES of the Foreign Country.

Violation of ordinances.

English Judges have been almost unanimous in rejecting such condemnations, and refusing to be bound by them. The reason for this refusal being that these ordinances are not part of the Law of Nations; are not of universal acceptance amongst other nations; and that therefore other nations are not bound to recognise them: although 'third 'persons and mercantile people are bound to take 'notice of them for their own safety.' (Lord Mansfield, C.J :—*Barzillay* v. *Lewis* [2].)

Ld: Mansfield, C.J.

[1] Park on Insurance, 8th ed: 431—730.
[2] *id*: 725.
[3] 7 T. R. 681.
[4] 8 T. R. 434.
[5] 8 T. R. 562.
[6] 1 East, 663.
[7] 3 B & P. 201.
[8] 7 Bing: 495.

Mayne v. *Walter.*[1] Lord Mansfield, C.J.
Barzillay v. *Lewis.*[2] „
Geyer v. *Aguilar.*[3] Lord Kenyon, C.J.
Pollard v. *Bell.*[4] „
Bird v. *Appleton.*[5] „
Price v. *Bell.*[6] „
Baring v. *Clagett.*[7] Lord Alvanley, C.J.
Dalgleish v. *Hodson.*[8] Tindal, C.J.

It is evident that the breach of the warrant of

Lawrence, J., in *Pollard* v. *Bell.*

neutrality cannot possibly be proved by a sentence of condemnation proceeding on the ground of non-compliance with certain peculiar ordinances of a foreign country: the sentence for this purpose is therefore rejected.

For example, the French ordinance on which the condemnation in *Bird* v. *Appleton* proceeded, required that the lists of crew and despatches should be regular. That is neither required by the Law of Nations, nor was it by Treaty between the two powers—France and the United States.

Bird v. *Appleton.* 8 T. R. 562.

Condemned as 'enemy's property' by the aid of ordinances.

But these conditions may be again varied:—*By the aid of these Foreign ordinances, the Court may have arrived at the conclusion that the ship was* ENEMY'S PROPERTY. The English Courts have held themselves bound by such sentences because the fact was found that the ship was enemy's property; and they do not regard the means by which this conclusion was arrived at.

Sir W. Grant, M.R.

'All these ordinances meant was to lay down rules 'of decision conformable to what lawyers and 'statesmen of the country understood to be the just 'principles of maritime law, and to apprise neutrals 'what their rules are. The Court of Admiralty in 'France has not taken them as positive laws binding 'on neutrals, but they refer to them as establishing 'legitimate presumptions, from which they are 'warranted to draw the conclusion that is necessary 'for them to arrive at, before they are entitled to 'condemn.' (Sir W. Grant, M.R.—*Kindersley* v. *Chase.*) And again:—'Looking at the whole of the 'sentence, it is impossible not to see that the French 'Court canvassed and decided on the probability 'of the ship's actually being, or the fitness of its 'being presumptively deemed enemy's property: 'or at least not neutral, in respect of certain estab-

Kindersley v. *Chase.* Park on Insurance, 8th ed: 743.

Ld: Ellenborough, C.J.

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'lished indicia on that head, collected together in 'the ordinances it refers to.' (Lord Ellenborough, C.J.—*Bolton* v. *Gladstone*.) And in the same case on appeal, Lord Mansfield, C.J., said:—'If 'the Court comes to the conclusion that the vessel 'is not neutral, it is quite immaterial through what 'media it arrived at it.' So also, Erle, C.J., in *Hobbs* v. *Henning*:—'We have no jurisdiction to inquire 'into the validity of the legal grounds of the judg-'ment.'

Bolton v. *Gladstone*. 5 East 155.

Ld. Mansfield, C.J.

Hobbs v. *Henning*. 34 L. J: C. P. 117.

Erle, C.J.

Baring v. *Royal Ass. Co*: 5 East 99.

'Infraction of Treaty' by the aid of ordinances.

The decision in *Baring* v. *Royal Exchange Assurance Co*: proceeds on the same ground: the condemnation was for infraction of a Treaty requiring ships to be properly documented: but the inferences were drawn in the sentence from *ex parte* ordinances in aid of the conclusion of such infraction of Treaty. Lord Ellenborough, C.J., held that the Court was bound to give credit to the sentence, although the Foreign Court had 'construed the Treaty iniquitously.'

Conclusions.

Briefly, the conclusions at which we have arrived are these:—

i. The Foreign Condemnation is conclusive, when it declares the vessel prize, as being enemy's property; irrespective of the grounds on which the Court proceeded.

ii. It is doubtful whether it is conclusive, when it declares simply that the ship belongs to the captors as prize.

iii. It is not conclusive, when it declares that the ship belongs to the captors as prize, by reason of a violation of ordinances binding solely on the Foreign Country.

Conclusions reviewed.

But these conclusions are drawn from cases between underwriters and the owners suing for the assurance on account of the loss of the vessel by

capture: in which the foreign sentence has been made use of merely for the purpose of deciding the question of the violation of neutrality: if therefore the doubt contained in the second conclusion should ever be decided against the conclusiveness of the condemnation, it will not in any way interfere with the theory of the conclusiveness of Foreign Judgments generally. It would appear that not being absolute in favour of the underwriters, it is absolute in favour of the assured. The difficulty lying in the solution of the question, does the Judgment negative the warrant of neutrality? If the answer is in the affirmative, the condemnation is absolute for the underwriter; if in the negative, it is absolute against him.

This consideration would apply also to the third conclusion, viewing it merely as deciding the question in issue between the underwriters and the assured. But the Judges have implied more than this; The ground given primarily for the rejection of the sentence has been certainly that the warrant of neutrality cannot be negatived by a condemnation proceeding on purely arbitrary ordinances; but the inference to be drawn from the tenor of the judgment is, that English Courts refuse to recognise such decisions, based upon ordinances not in accordance with International Law.

Breach of International Law.

It will be remembered that in the Chapter on Defences, the defence relying on a breach of International Law was not dealt with generally; it being foreseen that such a definite conclusion as that a breach of International Law would be, without exception, a good ground for rejecting the foreign judgment could not be arrived at. This case must therefore be separately considered.

Now in these cases proceeding on Foreign ordin-

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ances, there is an assumption on the part of the Foreign Court: And the English Courts have held that assumption to be, not a *mere* breach of International Law, but a breach *arbitrary and oppressive* upon the owners of merchantmen: that the discretion vested in the Foreign Government has been unwisely and unreasonably exercised; that this exercise has been dictated merely upon grounds of war: Therefore they have refused to be bound by the decision.

It must be borne in mind that this refusal has never been actuated by warlike feelings on the part of the English Courts. (Ashhurst, J.—*Geyer* v. *Aguilar*.) And this is borne out by the fact that in those cases where the ordinances—although arbitrary and not in conformance with International Law—led the Courts to the conclusion that the ship was enemy's property, or that a Treaty had been violated, the decisions have been recognised.

Geyer v. *Aguilar*. 7 T. R. 681.

β. as regards purchasers.

Effect of Admiralty decisions in cases between original owners and purchasers from captors.

The effect of these Admiralty prize decisions must be considered with relation to purchasers of the subject of the condemnation. We may now therefore proceed to notice the leading case of *Hughes* v. *Cornelius*. The marginal note is as follows:—

Hughes v. *Cornelius*. 2 Sm: L. C. 773.

Marginal note to *Hughes v. Cornelius*.

'The sentence in a foreign Court of Admiralty 'decreeing a ship to be lawful prize, is conclusive: 'and therefore though erroneous, the owner 'cannot recover the ship back by trover against 'the vendee.'

That is to say, the original owner of the vessel cannot recover it back from one who has bought it from the possessors under the prize adjudication. That adjudication has vested the property in the captors, and they are entitled to transfer the pro-

perty to a purchaser:—'For otherwise the mer-'chants would be in a pleasant condition: we must 'not set them at large again.' Sir William Scott makes this point very clear in the case of the *Flad Oyen*:—'The law of England and of nations 'requires a sentence of condemnation as necessary 'to transfer the property: and a neutral purchaser 'in Europe during war, does look to the legal sen-'tence of condemnation as one of the title-deeds of 'the ship, if he buy a prize vessel.'

Sir W. Scott.

The Flad Oyen. 8 T. R. 270n.

The condemnation of a captured vessel as a prize to the Sovereign is conclusive on the Common Law Courts that no one else is entitled to a share in it, should any action be brought for a share by an ally, or by any other person. (*Duckworth* v. *Tucker.*) *Hughes* v. *Cornelius* proceeds further—'though the judgment be erroneous.'

Duckworth v. Tucker. 2 Taunt: 7.

Hughes v. *Cornelius.* 2 Sm: L. C. 773.

ERROR. Error of the Foreign Court cannot be set up: And this applies to both divisions of Admiralty prize decisions, as regards underwriters, and as regards purchasers. Thus Blackburn, J., in *Castrique* v. *Imrie*, in the House of Lords:—'There is no authority for 'saying that the purchaser under the decree of a 'foreign Court having competent jurisdiction to de-'cree the transfer, is to be responsible for any mis-'takes made by the Court.'

Blackburn, J.

Castrique v. Imrie. L. R. 4 H. L. 414.

Wilful and apparent error. With regard to wilful and apparent error, we can do no more than refer to the very strong expression of opinion by some of the Judges, against being bound by a judgment proceeding on a wilful error, even if the judgment were *in rem*, speaking through Cockburn, C.J., in *Castrique* v. *Imrie.*

Castrique v. Imrie. 30 L. J: C. P. 177.

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C. ADMIRALTY DECISIONS NOT IN MATTERS OF PRIZE.

Decisions of foreign Admiralty Courts not in matters of prize.

Although the same general principles apply to these decisions as to those in matters of prize, it has been thought advisable to separate them on account of the many principles necessary to be taken into account in dealing with prize cases.

Under this head there are two very important recent cases: *Cammell* v. *Sewell* and *Castrique* v. *Imrie*. The conclusions to be drawn from the several elaborate judgments delivered in these two cases, in which no less than twenty Judges have been engaged at different times, coincide entirely with the general principles of defence; viz: that the Jurisdiction may be attacked; and that Fraud may be set up.

DEFENCES. JURISDICTION. FRAUD.

Inherent difficulty in these cases as to nature of judgment.

The difficulty, which caused a division of opinion among the Judges, was whether the judgment in either case was *in rem*, or in the nature of a judgment *in rem*, or *in personam*: in other words, whether third parties might or might not controvert the foreign decision: and this is a difficulty which must exist in every case.

Cammell v. *Sewell.* 27 L. J: Ex: 447. (on app:) 29 L. J: Ex: 350.

Cammell v. *Sewell*.

In *Cammell* v. *Sewell*: the judgment had been delivered by the Superior Court of Drontheim, confirming an act of survey and public auction of a ship and cargo of deals which had got on shore on the coast of Norway: The act of survey and public auction were judicial proceedings, from which, by the law of Norway, appeals will lie: and such sale by the master transfers the property in the cargo. The sale however was unnecessary, and the agent of the underwriters had protested.

In the Exchequer, the judgment was held to be in the nature of a judgment *in rem*; and this was affirmed in the Exchequer Chamber.

Castrique v. *Imrie*.

In *Castrique* v. *Imrie*: proceedings on a dishonoured bill were taken in the Tribunal de Commerce at Havre, against the master and against the ship. The Court condemned the master 'en sa qualité de Capitaine, et par privilège 'sur le navire,' to pay the amount of the bill; and declared him free from arrest, to which he would otherwise have been liable.

The Civil Tribunal confirmed the decision of the Court of Commerce, the owner and the first mortgagee having been summoned; and the ship was ordered to be sold by public auction.

The plaintiff, the last mortgagee of the ship, brought a suit in the Civil Tribunal of Havre to release the ship. The original seizure was upheld, and the plaintiff condemned in costs, because the Court (misconceiving the English Law) thought that by that law, no valid transfer could be made of a ship, to the prejudice of creditors, whilst she was on a voyage, unless the sale appeared on the ship's papers.

The Court of Common Pleas held the judgment to be *in personam*:

The Court of Exchequer Chamber held it to be *in rem*; and this decision was affirmed by the House of Lords.

Principles for determining whether a judgment is *in rem*; *Cockburn, C.J.*

From the judgment of Cockburn, C.J., in the Exchequer Chamber, some guiding principles may be gathered, for deciding questions of this kind.

If in terms a suit against the ship.

If the suit out of which the judgment arises, although in its inception a proceeding *in personam* so far as the master of the vessel is concerned, be in terms a suit *against the ship*; in this respect it is a proceeding *in rem*.

Sale of ship

In all cases where there is a money demand on which the Court first adjudicates, and in satisfac-

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tion of which it *decrees the sale of the ship*; such a decree is a judgment *in rem*. As in proceedings on the hypothecations or *quasi*-hypothecations of a vessel: a money liability has first to be established; the remedy is by a judgment decreeing the sale of the vessel.

decreed in satisfaction of money demand first adjudicated on.

'The Sentences of Admiralty Courts in the 'matter of maritime liens have always been con- 'sidered as judgments *in rem*. In one sense they 'are properly so; for the purpose of the suit, and 'the effect of the judgment, are to afford a remedy, 'not by execution against the person or the general 'estate of the defendant, but by appropriation of 'a specific chattel to satisfy the plaintiff's claim.'

Admiralty decisions in the matter of maritime liens.

Castrique v. *Behrens*. 30 L. J: Q. B. 163.

Simpson v. *Fogo*. 32 L. J: Ch: 249.

See also the judgments of Crompton, J., in *Castrique* v. *Behrens*, and of Wood, V.C., in *Simpson* v. *Fogo*.

D. Condemnations of Foreign Exchequer Courts.

The last division of Foreign Judgments *in rem* comprises those which correspond with Condemnations in the English Court of Exchequer.

Condemnations of Exchequer Courts.

These condemnations depending upon the Revenue Laws of the Foreign Country, it is presumed they will not be regarded.

Revenue Laws.

Finally, we must consider the converse of Judgments *in rem*,

Acquittals.

Cooke v. *Sholl*. 5 T. R. 255.

The subject was argued in the case of *Cooke* v. *Sholl*, where an acquittal in the Exchequer was given in evidence. Lord Kenyon, C.J., said 'that 'he conceived that the judgment of acquittal, being 'a judgment *in rem*, was conclusive as to the ques-

Acquittals.

Ld: Kenyon, C.J.

'tion of the illegality of the seizure, and precluded 'all reasoning upon the construction of the permit.'

But it is very doubtful whether an acquittal is equivalent to a judgment *in rem*, or is even in the nature of a judgment *in rem*.

In Bull's Nisi Prius (page 245) an acquittal is said not to be conclusive. And Sir Robert Phillimore says that the doctrine of an acquittal being absolute has been questioned:—'For the 'acquittal does not, like a conviction, ascertain any 'precise fact, and may have proceeded on the 'ground of insufficient evidence.'

Sir R. Phillimore.

Theoretical view of the case.

Now a judgment *in rem* vests a right in a certain person; and imposes on every one else the negative duty correlative to the right:

An acquittal vests a right in a certain person; but the obligation correlative is positive, and is imposed exclusively upon the officer who has seized the goods, to deliver them up to the owner:

It would appear therefore, that an acquittal is in reality a judgment *in personam*.

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CHAPTER IV.—**STATUS.**

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WE must now proceed to the consideration of those *quasi* judgments *in rem* deciding questions of *status*:

Division of the subject.

The division of the subject will be as follows:—

I. Marriage. Divorce. Legitimacy.

II. Lunacy.

III. Guardianship.

IV. Probate.

V. Bankruptcy.

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I. MARRIAGE. DIVORCE. LEGITIMACY.

Marriage. Divorce. Legitimacy.

Being intimately associated, it has been thought best to consider these three subjects under one division.

Briefly, the questions involved are:—

The questions involved.

i. What effect is given to foreign sentences upholding or annulling marriages between the subjects of the Foreign Country?

ii. Can a marriage solemnized in one country be dissolved in another? If this is done, will the sentence of divorce be recognised by the Courts of the Country in which the marriage was solemnized?

The effect of foreign sentences between foreign subjects.

i. The discussion of the first question is not involved in any difficulty. The only two cases that arise are:—

α. Where the marriage was celebrated in the country to which the parties are subject.

β. Where the marriage was celebrated in a foreign country.

Where the marriage celebrated in country to which parties subject.

α. In this case there can be no doubt that the decree will be recognised: for the Courts of the Foreign Country having jurisdiction over the parties, and having considered the question, their decision must have effect given to it by the Courts of another Country before which it comes; whether that decision upholds or annuls the marriage; and the children of a second marriage will be considered illegitimate or legitimate according to that decision. (Lord Cranworth—*Shaw* v. *Gould.*)

Shaw v. *Gould.* L. R. 3 H. L. 55.

Where the marriage celebrated in a foreign country.

β. The second case is not quite so free from doubt. It may be stated in another form:—Can an English marriage between two foreigners be annulled by the Courts of their own Country?

Lord Cranworth however expressed his opinion that such a divorce would be binding on the English Courts; and that the children of a second marriage would be held legitimate.

Effect of sentence of one country dissolving marriage of another country.

ii. The second question remains to be considered. For convenience we may take the parties to be English; the marriage to have been in England; and the sentence of divorce to have been in Scotland. (The English Divorce Laws not being in operation in Scotland.) To what extent is this sentence entitled to respect from the English Courts?

The whole subject was elaborately discussed in the House of Lords, in 1868, in the case of *Shaw* v. *Gould*; and judgments were delivered by Lords Cranworth, Chelmsford, Westbury, and Colonsay. It will be convenient to follow the line of argument propounded in their Lordships' judgments.

Shaw v. *Gould.* L. R. 3 H. L. 55.

Effect of decision in *Lolley's case*: *Ld: Cranworth.*

Lolley's case, which has been repeatedly considered and reviewed, decided this point, and no more:

Lolley's Case. 2 Cl: & Fin: 567.

'The Scotch Court has no power to dissolve an 'English marriage, where the parties are not 'domiciled in Scotland, but have gone there only 'for such a time as would render them amenable to 'the jurisdiction of the Scotch Courts.'

The old doctrine of indissolubility of English marriage not maintainable.

The old doctrine, that a Foreign Court has no power to dissolve an English marriage, does not rest on any recognised rule of International Law, and cannot be supported. It seems indeed to regard marriage as a species of judgment which Foreign Courts have no power to review.

Marriage not a civil contract:

The marriage contract does not stand on the same footing as ordinary business contracts; and the

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lex loci contractus is not the sovereign rule for determining, and is not necessarily to be adopted by the Foreign Court whilst it is determining 'all 'questions as to the rights, duties and obligations 'arising out of that relation, and the remedy or 'redress to be given in the event of either party 'acting in violation of the contract.' (Lord Colonsay.)

lex domicilii the governing principle. *Ld: Colonsay.*

In certain cases however it may be necessary to take the *lex loci contractus* as the governing principle:
for example; if the enquiry be whether the formalities necessary to constitute the relations have been complied with, as required by the law of the country where the marriage took place. But it is not an universal rule; and especially in the case of remedy or redress is it not to be applied.—

Where *lex loci contractus* to be followed.

'If a divorce is to be regarded as a remedy for the 'breach of the matrimonial contract, it is a general 'principle of International Law that all remedies 'depend upon the *lex fori*, and not on the *lex loci* '*contractus*.' (Lord Chelmsford.)

Ld: Chelmsford.

Simonin v. *Mallac.* 29 L. J: P. & M. 97.

[In *Simonin* v. *Mallac* however, Sir C. Cresswell said that the contract of marriage was to be judged of, as any other contract, by the *lex loci contractus*; except in certain cases where it would give way to the *lex domicilii*: viz: in 'marriages involving 'polygamy and incest; those positively prohibited 'by the law of a country from motives of policy, '*e.g.* by our Royal Marriage Act.'

The other doctrine: *lex loci contractus* the governing principle. *Sir C. Cresswell.* Where *lex domicilii* to be followed.

The result appears to be the same as that of the principle just enunciated.]

We are therefore to consider a foreign divorce in the same manner as any other foreign judgment; and, marriage not being strictly a contract, the defences that the *lex loci contractus*, that is the

Foreign divorce the same as any other foreign judgment.

DEFENCES. ERROR. law of England, has been misinterpreted either unintentionally or wilfully are at once negatived. Before leaving the subject of error, there is one paragraph in Lord Colonsay's judgment which must be noticed The respondents denied that the decree was valid according to the law of the country where it was pronounced. His Lordship said :—'If 'we are to go into that enquiry, we must deal with 'it upon the evidence, and the evidence, so far as it 'goes, is in favour of the validity of the decree. I 'therefore presume that we must deal with the case 'upon the footing that the decree is or may be, a 'valid decree of divorce in Scotland.' It is submitted, that the validity of the decree according to Scotch law cannot be questioned or gone into; and that there is no reason for not treating the judgment of divorce in the same way in this respect as all other judgments :—that they cannot be reviewed on account of an error in their own law or procedure.

Ld: Colonsay.

JURISDICTION. We come now to the consideration of the important defence by which the Jurisdiction of the Court pronouncing the divorce is attacked.

The person against whom the divorce has been pronounced may have been either—

i. *bonâ fide* in the country, and have received notice : or
ii. not in the country, but have received notice : or
iii. not in the country, and not have received notice : or
iv. the divorce may have been granted *ex parte*.

Divorce granted *ex parte.* In the latter case the Court's jurisdiction may be attacked. (*Colliss* v. *Hector.*) In the other cases, should they arise, it is presumed that the principles applying to other judgments would also apply here ; the proceeding *ex parte* however, from its nature,

Colliss v. *Hector.* L. R. 19 Eq: 334.

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seems to be the one which would most frequently arise.

Jurisdiction created by parties *in fraudem legis.*

But although the Court apparently had jurisdiction over the parties, this jurisdiction may have been created by the parties themselves acting *in fraudem legis.*

Assumed jurisdiction in divorce by Scotch Courts.

For example, by the law of Scotland, a residence there of forty days gives the Scotch Court jurisdiction to entertain a suit for divorce against the person who has so resided. A man desirous of marrying a married woman, might induce her or her husband to reside in Scotland for this period, and for this purpose; and then to proceed to obtain a divorce from the Scotch Tribunals. These were the facts in *Shaw* v. *Gould.*

Shaw v. *Gould.* L. R. 3 H. L 55.

Not regarded in England.

In that case it was held that the divorce was valid only by the laws of Scotland, and therefore was restricted in its effect to Scotland; but that in England it could not be regarded as having any binding effect, as one of the parties was not really domiciled in Scotland, but had gone there for the sole purpose of founding a jurisdiction, and of evading the laws of England.

Domicil.

The question whether and what domicil would be sufficient to found a jurisdiction in the foreign Court is involved in many difficulties: The domicil requisite to give the Court jurisdiction to pronounce the divorce has sometimes been called '*bonâ fide*:' sometimes 'real'—or 'complete'—or 'for all 'purposes' (Lord Colonsay); but the better opinion seems to be, that where the dissolution of marriage has been obtained, whether with or without an acquired domicil in the Foreign Country, *in fraudem legis*, it will not be recognised.

Temporary residence in Scotland

'But, if you put the case of the parties resorting 'to Scotland with no such view, and being resident

not *in fraudem legis.* *Ld: Colonsay.*

'there for a considerable time, though not so as to 'change the domicil for all purposes; and then 'suppose that the wife commits adultery in Scot- 'land, and that the husband discovers it, and imme- 'diately raises an action of divorce in the Court in 'Scotland where the witnesses reside, and where 'his own duties detain him, and that he proves his 'case and obtains a decree, which decree is unques- 'tionably good in Scotland, and would, I believe, 'be recognised in most other countries; I am slow 'to think that it would be ignored in England, be- 'cause it had not been pronounced by the Court of 'Divorce here. How would the Court of Divorce 'here deal with the converse case?' (Lord Colonsay.) This question was raised as a very doubtful one by Lord Chelmsford; and also in *Conway* v. *Beazley*. *Conway* v. *Beazley.* 3 Hagg: E. R. 639.

Example of *animus revertendi.*

But in *Pitt* v. *Pitt,* which was decided by the House of Lords in 1864, the counsel for Colonel Pitt, the Respondent, admitted that the sentence of divorce which he had obtained in Scotland could not be upheld unless it could be shewn that before and during the suit Colonel Pitt was permanently domiciled in Scotland; and the Lords, being of opinion that he had no such domicil, by reason of there existing an *animus revertendi,*—he having gone there merely to evade his creditors,—held that the Scotch Court had no jurisdiction to pronounce the decree of divorce. *Pitt* v. *Pitt.* 4 Macq: H. L. 627. *Lolley's case.* 2 Cl: & Fin: 567.

Lolley's case and *Shaw* v. *Gould* identical.

The decisions then in *Lolley's case* and in *Shaw* v. *Gould* must be taken as identical. *Shaw* v. *Gould.* L. R. 3 H. L. 55.

From the expressions which fell from Lord Cranworth at the close of the latter case, his lordship's judgment in *Dolphin* v. *Robins* is now to be taken as not exceeding the principle of these cases. *Dolphin* v. *Robins.* 29 L. J: P. & M. 11.

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Conway v. *Beazley* is to the same effect: and see also *Brook* v. *Brook* and *Tollemache* v. *Tollemache*.

Conway v. *Beazley*. 3 Hagg: E. R. 639. *Brook* v. *Brook*. 9 H. L. ca: 193. *Tollemache* v. *Tollemache*. 30 L. J: P. & M. 115. *re Wilson's Trusts*. 35 L. J: Ch: 248. *Tovey* v. *Lindsay*. 1 Dow: 117. *M'Carthy* v. *Decaix*. 2 R. & M. 614. *Shaw* v. *A.-G.* L. R. 2 P. & M. 156. *goods of Crofts*. L. R. 2 P. & D. 18.

The principle therefore enunciated by Kindersley, V.C., when *Shaw* v. *Gould* was before him (*in re Wilson's Trusts*), and which was also held by Lord Eldon, L.C., in *Tovey* v. *Lindsay*, and by Lord Brougham, L.C., in *M'Carthy* v. *Decaix*, as to the indissolubility of an English marriage by a decree pronounced by a Foreign Court, must now be taken to be overruled. So too the judgment of Lord Penzance in *Shaw* v. *the Attorney-General*, that 'in 'no case can a foreign divorce invalidate an English 'marriage between English subjects, where the 'parties were not domiciled in the foreign Country' must be taken to be qualified in the manner suggested by Lord Colonsay. Lord Penzance seems also to have doubted whether even domicil itself would give the foreign Court jurisdiction: but that if the divorce proceeded on grounds of divorce recognised in this country, there being no collusion, the tribunals here would act upon the decree. This appears also to have been the ground of the decision *in the goods of Harriet Crofts*.

Ld: Penzance.

It will be seen however that the conclusions we have arrived at lead us to consider this distinction unnecessary:—domicil not obtained in *fraudem legis* being sufficient to make the foreign decree valid.

As to the wife's domicil, 'in general she is deemed 'to have the same domicil as her husband; and she 'can during the coverture acquire none other, *suo* '*jure*.' (Story—Conflict of Laws, § 136.) A more difficult question arises however in considering whether without exception the wife's domicil follows that of the husband: It would appear that where the husband has acquired a new domicil as

Domicil of wife. *Story*. § 136.

above, *in fraudem legis*, the domicil of the wife will remain unchanged.

FRAUD. Again, that Fraud in the ordinary acceptation of the word, that is, concert or connivance in the acts upon which the decree proceeds, will invalidate the proceedings, there can be no doubt: but Fraud may be greatly extended so as to include collusion in obtaining the decree, and it has been argued that if a just cause of divorce exist, any arrangement to bring the facts before a Court of competent jurisdiction however purchased or obtained is unobjectionable. (Lord Chelmsford.) We have been considering the case of a mutual arrangement to found a jurisdiction in the Court; this of itself is sufficient to invalidate the decree: but their Lordships carefully avoided calling this collusion, even though it were stipulated that the party going thus into the Foreign Country should receive a sum of money when the divorce was obtained.

The mutual arrangement to found jurisdiction is not collusion.

Example of collusion.

But there *was* collusion in *Shaw* v. *Gould*: the stipulation was that a sum of money should be paid when the parties were divorced, but the recipient was restrained from any attempt to defeat the proceedings, by the imposition of a forfeiture of the money in case he should, 'by himself, or by 'any one through him, give information which should 'be prejudicial to the divorce.' And in *Dolphin* v. *Robins* the agreement was similar. A Divorce obtained under such circumstances, being 'a mere 'mockery and collusion from beginning to end,' cannot be supported.

Shaw v. *Gould*. L. R. 3 H. L. 55.

Dolphin v. *Robins*. 29 L. J: P. & M. 11.

cf: p. 127. This is a parallel case with *Don* v. *Lippman*, where the defendant was an alien enemy, and was therefore by force prevented from appearing to defend the action abroad. Whether the Court has jurisdiction is therefore the important question to

Don v. *Lippman*. 6 Cl: & Fin: 1.

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be affirmed or negatived: and the consideration is not altered by the fact of the parties having been of different nationalities.

In all respects then the general theory of foreign judgments applies to the case of foreign divorces:—

In one point only do the rules applying to divorces appear to exceed the theory:—That although the Foreign Court apparently had jurisdiction over the persons of the parties, yet this may be met by proof that the jurisdiction was created by the parties themselves *in fraudem legis*; taking advantage of the peculiar provisions of the Law of Divorce in the Foreign Country, and the difference between that law and the law of their own country.

Rules as to divorce apparently exceed the general theory.

The reason assigned by Lord Westbury for this is, that 'Marriage is the very foundation of civil 'society, and no part of the laws and institutions 'of a country can be of more vital importance to 'its subjects than those which regulate the manner 'and condition of forming, and, if necessary, of 'dissolving, the marriage contract.' That 'no 'nation can be required to admit that its domiciled 'subjects may lawfully resort to another country 'for the purpose of evading the laws under which 'they live.' And that 'when they return to the 'country of their domicil, bringing back with them 'a foreign judgment so obtained, the tribunals of 'the domicil are entitled, or even bound, to reject 'such judgment as having no extra-territorial force 'and validity. They are entitled to reject it, if 'pronounced by a tribunal not having competent 'jurisdiction; and they are *bound* to reject it if it 'be an invasion of their own laws and policy.'

Ld: Westbury.

cf: *Ld: Campbell* in *Brook* v. *Brook.*

Brook v. *Brook.* 9 H. L. ca: p. 220.

Now the difficulty we are in is, that this rule seems to be fully accounted for by the doctrine

This apparent difference

may be accounted for by reason of a wilful disregard of *lex loci contractus*.

that the *lex loci contractus* ought to govern the case when it is adjudicated on by a foreign tribunal; and that there has been a wilful disregard of that law by the tribunal: This by many judges, it will be remembered, has been considered a sufficient ground for a rejection of the judgment. But all their Lordships concurred, as we have seen, in declaring that the *lex loci contractus* is not the sovereign rule in judging of the marriage contract. Indeed, if it were the sovereign rule, English Courts would be bound, for example, to divorce Germans married in Germany and domiciled in England on the ground of incompatibility of temper. (Lord Brougham—*Warrender* v. *Warrender*.) *Warrender v. Warrender.* 9 Bl: N. S. 89.

This explanation must therefore be rejected.

But this explanation must be rejected.

An explanation may however still be found in agreement with the general theory.

Once more, let us revert to a former conclusion:—That if the judgment is obtained in accordance with a Statute passed by a Foreign Country, which, being considered here, is not an unreasonable protection to be afforded by such Foreign Country to its own subjects (and therefore also to its domiciled subjects), nor at variance with the principles of Natural Justice, the English Courts will enforce it.

cf: p. 91.

Assumed jurisdiction.

Nearly all the cases then considered involved the principle of assumed jurisdiction; and the question to be asked and answered was, whether the discretion supposed to be vested in the Foreign Sovereign Authority had been exercised wisely and reasonably. In many, if not in all the cases, the English Courts refused to say that the Foreign Country had exercised its discretion unwisely or unreasonably:—

But in this case, the assumption of jurisdiction to

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sever the social tie which has been formed in one country by a method, amounting almost to an invitation to people to cross the border for the mere purpose of setting the laws of their own country at defiance, is an exercise of that discretion so unwise and so unreasonable, that although the foreign judgment may be perfectly valid and binding in that country, and as touching any question exclusively in that country, would be considered as such all over the world, even in this country whose laws had been so set at naught; yet, as touching any question in this country, the English Courts would be justified in refusing to acknowledge that validity and to be bound by it.

Unwise and unreasonable assumption by Foreign Court.

Phillips v. *Hunter.* 2 H. Bl: 402.

Note however Lord Chief Justice Eyre's remarks in *Phillips* v. *Hunter*, ridiculing the proposition that a British subject shall not be allowed to contravene a British Act of Parliament, (page 207).

We must proceed one step farther:—The case of *Simonin* v. *Mallac*, decided by Sir Cresswell Cresswell, which was followed by Sir R. Phillimore in *Sottomayor* v. *De Barros*, erroneously, as the Court of Appeal afterwards held, remains to be considered.

Simonin v. *Mallac.* 29 L. J: P. & M. 97. *Sottomayor* v. *De Barros.* L. R. 2 P. & D. Div: 81. (on app:) 47 L. J: P. & M. 23. *Shaw* v. *Gould.* L. R. 3 H. L. 55.

The parties were French, and came to England to avoid certain provisions of the Code Napoléon. So far, the case is the converse of *Shaw* v. *Gould*; (except as to the relations between the countries): and agreeably with that decision, if the woman had continued to live in England, the English Courts would have pronounced the marriage valid: if she had returned to France, the French Courts would have pronounced it null and void.

Simonin v. *Mallac.*

But in point of fact, the French Courts did pronounce against the marriage: and it was this deci-

sion, and not the validity of the marriage itself, that came before the English Courts. The learned Judge Ordinary refused to recognise the decision :—

Sir C. Cresswell. 'What right,' he said, 'has one independent nation 'to call upon any other nation to surrender its own 'laws in order to give effect to such restrictions and 'prohibitions. If there be such right, it must be 'found in the Law of Nations.' [The judgment, it will be remembered, proceeded on the ground that the *lex loci contractus* and not the *lex domicilii* was to be adopted by the Court.]

The result of this decision, as applied to *Shaw* v. *Gould*, is that the Courts in Scotland would have been justified in disregarding that decision, should the woman they had divorced have returned to Scotland.

Sir Robert Phillimore certainly followed this decision in *Sottomayor* v. *De Barros*, but it seems reluctantly: if this important question had not been embarassed by precedents of former decisions, especially as his Lordship supposed by the judgment on *Simonin* v. *Mallac*, it appears that he would undoubtedly have held that 'the *jus gentium* 'would require the *lex fori*, which is also the *lex* 'loci contractus, to adopt for the occasion as its own 'law the *lex domicilii*; as in an analogous case— '*Dalrymple* v. *Dalrymple*—Lord Stowell speaks of 'the law of England withdrawing altogether and 'leaving the legal question to the exclusive judg- 'ment of the law of the foreign country.' The result of the decided cases is, as his Lordship stated, the doctrine, that 'the Court of the domicil 'recognises certain incapacities affixed by the law 'of the domicil as invalidating a marriage between 'parties belonging to that domicil in a foreign state 'in which such marriage is lawful.' But the doc-

Sottomayor v. De Barros. L. R. 2 P. & D. Div: 81.

Simonin v. *Mallac.* 29 L. J: P. & M. 97.

Sir R. Phillimore.

Dalrymple v. Dalrymple. 2 Hagg: C. R. 54.

General summary of doctrines to be deduced from cases.

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trine goes further—neither is the marriage itself recognised, nor a judgment of the Courts of the foreign State establishing the marriage; because such a judgment ought never to have been pronounced, being a wilful application of the wrong law, the *lex loci contractus* for the *lex domicilii.*

Brook v. *Brook.* 9 H. L. ca: 193.

cf: Lord Campbell's judgment in *Brook* v. *Brook*—

'I am by no means prepared to say, that the marriage now 'in question (between a man and his deceased wife's sister) 'ought to be or would be held valid in the Danish Courts, 'proof being given that the parties were British subjects 'domiciled in England at the time of the marriage, that 'England was to be their matrimonial residence, and that 'by the law of England such a marriage is prohibited as 'being contrary to the law of God.'

Ld: Campbell.

'But the decided cases,' continued Sir R. Phillimore, 'do not establish the converse doctrine, that 'the Court of the place of the contract of marriage 'is bound to recognise the incapacities fixed by the 'law of the domicil on the parties to the contract 'when those incapacities do not exist according to 'the *lex loci contractus.* It might appear that 'according to the *jus gentium* the latter proposition 'is a consequence of the former, and I remember 'addressing such an argument to the full Court of 'Divorce in *Simonin* v. *Mallac,* but in vain.'

Sir R. Phillimore.

Simonin v. *Mallac.* 29 L. J: P. & M. 97.

It was on this point that the Court of Appeal reversed the decision; Cotton, L.J., holding that the learned Judge had not fully appreciated the reasons given by Sir C. Cresswell in *Simonin* v. *Mallac* for refusing to recognise the French judgment: that consequently this second proposition was not an accurate statement of the law, but that the decided cases and all jurists agree in establishing the converse doctrine, that the incapacities fixed by the law of the domicil on the parties to

Cotton, L. J.

Sottomayor v. *De Barros.* 47 L. J: P. & M. 23.

the contract are to be recognised by the Courts of the place of the contract.

But it is evident, whether we take the doctrine as stated by the House of Lords—the *lex domicilii* the guiding principle, except in matters of form and ceremonial—or whether we take it to be as enunciated by Sir C. Cresswell—the *lex loci contractus* the guiding principle, except in polygamy, incest (as universally accepted in Christian States being contrary to God's law, or as specially declared to be contrary to that law by the Legislature of the Country), or statutory prohibitions, that the incapacity mentioned in this doctrine must be a *personal* incapacity.

Personal incapacity.

Now, in *Simonin* v. *Mallac* the incapacity was not personal, but arose merely from the non-performance of the '*acte respectueux et formel*' required by the Code Napoléon, asking the father's consent; and also the absence of the necessary two publications: It was therefore strictly in accordance with the doctrine that the validity of the *marriage* should be decided by the *lex loci contractus*, that is, the law of England: but the decision goes further—neither are such incapacities themselves recognised, nor a judgment of the Courts of the domicil annulling the marriage on those grounds.

Simonin v. *Mallac.* 29 L. J: P. & M. 97.

It might possibly appear that the *jus gentium* would require a judgment annulling a marriage thus obtained *in fraudem legis* to be recognised by the Courts of the country where the marriage was celebrated, as it would be, without doubt, in any other country: but the decided cases do not warrant such a doctrine.

The proposition laid down by Sir R. Phillimore, that legal incapacity by the law of the domicil should be recognised by Courts of the country of

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the contract, is therefore too broad; and it was for this reason that the learned judge's argument, when counsel before the full Court of Divorce, was in vain, and that the *jus gentium* did not require the *lex fori*, which was also the *lex loci contractus*, to adopt for the occasion as its own law the *lex domicilii*.

NOTE ON MRS: BULKLEY'S CASE.

Appendix to PITT *v.* PITT. (4 *Macqueen's H.-L. cases.* 676).

Note on Mrs: Bulkley's case in France.

Mrs: Bulkley having married a resident of Holland, was divorced there: The inferior Courts in France held that she was incapable of contracting marriage in that country: The Cour de Cassation however reversed this decision, and held that having been legally divorced abroad, she was free to marry again in France.

JUDGMENT OF THE COUR DE CASSATION.

Judgment of Cour de Cassation.

The references were to Articles 3, 6, and 147 of the Code Napoléon; and to Article 1 of the Law of May 8, 1816. The Court proceeded—

'Attendu que le mariage, en France, est un contrat 'civil; qu'il ne peut être interdit qu'à ceux qui ont 'en eux un motif d'empêchement établi par la loi 'civile;—

'Attendu que si l'Art: 147 du Code Napoléon 'défend de contracter un second mariage avant 'la dissolution du premier, cette défense n'existe 'pas toutes les fois que la preuve de la dissolution 'du premier mariage est rapportée;

'Que cette preuve est faite de la part de l'étranger, 'marié à l'étranger, lorsqu'il établit que son mariage 'a été dissous dans les formes et selon les lois du

'pays dont il était sujet ;—Que telle est la conséquence du principe, reconnu par l'Art : 3, Code 'Napoléon, de la distinction des lois réelles et des 'lois personnelles, que celles-çi, qui regissent l'état et 'la capacité des personnes, suivent les Français, 'même résidants en pays étranger; et suivent également en France l'étranger qui y réside ;—

'Que c'est donc par les lois de son pays, par les 'faits accomplis dans ce pays conformément à ses 'lois, que doit être appréciée la capacité de l'étranger pour contracter mariage en France ; qu'ainsi, 'l'étranger, dont le premier mariage a été légalement dissous dans son pays, soit par le divorce, 'soit par toute autre cause, a acquis définitivement 'sa liberté et porte avec lui cette liberté partout 'où il lui plaira de résider :—

* * * * * *

'La loi Française a confirmé le respect dû aux 'législations étrangères statuant sur l'état et la 'capacité des personnes soumises à leur souve-'raineté ;

Facts of the case.

'Attendu, en fait, qu'il était constaté, et qu'il n'est 'pas contesté par l'arrêt attaqué, que Mary Anne 'Bulkley, Anglaise d'origine, mariée en Hollande 'avec Anthony Bouwens, sujet Hollandaise, avait 'été divorcée en 1858 par jugement du tribunal de 'La Haye, inscrit sur les registres de l'état civil 'conformément à la loi du pays.'

'Que, par conséquent, Mary Anne Bulkley, lors-'qu'elle se présentait en 1859 devant l'officier de 'l'état civil du 10me arrondissement de Paris, pour 'contracter mariage, justifiait de la dissolution de 'son précédent mariage, et ne se trouvait pas dans 'le cas de prohibition de l'Art : 147 du Code 'Napoléon :

* * * * * *

'Par ces motifs, la Cour casse et annulle l'arrêt 'de la Cour Impériale de Paris du 4 Juillet, 1859 ; 'et remet les parties en même état qu'avant le dit 'arrêt ;

* * * * * *

From this judgment we see that in France marriage being essentially a civil contract, the *lex*

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loci contractus, where the contract takes place in the country of the parties, governs the French Courts when foreigners apply to them for a decree of divorce. We may presume therefore that an English divorce between French subjects not being in accordance with the law of France would not be regarded.

II. LUNACY.

Lunacy.

The authorities are unanimous in holding that an English Court will recognise the validity of a finding in lunacy by a competent Foreign Court. The short note in Vezey's Reports to *ex parte Otto Lewis* is as follows:—'One found *non compos* 'before a proper jurisdiction, the Senate of Ham- 'burg, where he resided, and a curator and guardian 'appointed; the Court took notice of it.' This case was approved and followed by Lord Loughborough, L.C., in *ex parte Gillam*.

Foreign finding in lunacy recognised.

exp: Lewis. 1 Vez: Sen: 208.

exp: Gillam. 2 Vez: 588.

But further enquiry requisite here to obtain protection of Lord Chancellor.

Ld: Eldon.

In *re Houstoun* however it was held that a lunatic residing in England, having property in Jamaica where he was found lunatic, must still be the subject of an enquiry in England, in order to obtain the protection of the Lord Chancellor. (See Elmer's Practice in Lunacy, 6th: ed: p. 15.) 'The 'Commission now existing in Jamaica is no reason 'why a commission should not issue here. On the 'contrary, it is evidence of the absolute necessity 'that there should be somebody authorised to deal 'with the person and estate of the lunatic. While 'he is here, no Court will have any authority over 'him or his property, unless a commission is taken 'out.' (Lord Eldon, L.C.)

re Houstoun. 1 Russ: 312.

Foreign *curator bonis* may apply for transfer of lunatic's money.

Case of a foreign subject.

The result seems to be that if a *curator bonis* has been appointed by the Foreign Court he will be entitled to apply to the English Courts to have transferred to him any money standing in the English funds, as of right. (*re Stark.*) In this case the Lord Chancellor intimated that if the lunatic were a subject of the Foreign Country (Holland) where he had been so found, he would

re Stark. 2 Mac: & Gor: 174.

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have had no difficulty in at once making the order; but being an English subject, he made a preliminary order first for payment of the dividends, and directed a reference to the Master to ascertain whether the Curator was entitled to the *corpus* of the funds by Dutch Law. The Master reported that he was so entitled and that the Lunatic was duly declared. The Lord Chancellor thereupon made the order, observing that he assumed that no security had been given by the Curator, and that none was required by Dutch Law. In *Hessing* v. *Sunderland* the order of transfer was also made.

Case of an English subject.

Reference to the master for report.

Hessing v. *Sunderland.* 25 L. J: Ch: 687.

But this does not seem always to have been done: in *re Stark*, although the master's report was in the affirmative on all the points into which enquiry was directed, the Lord Commissioner, Lord Langdale, said the granting of the order was in his discretion; that the sum was too large for the security; that no reason had been assigned for the transfer and that he would not therefore make an order to transfer the *corpus*: He cited *re Morgan*, where his Lordship said the same course had been pursued by Lord Cottenham, L.C.:—This decision was followed by Malins, V.C., in *re Garnier*; the reason assigned for the refusal being, that it appeared that the lunatic was sufficiently provided for.

re Stark. 2 Mac: & Gor: 174.

re Morgan. 1 H. & T. 212.

re Garnier. L. R. 13 Eq: 532.

Reasons assigned in different cases for not granting transfer although master's report favourable.

The enquiry by the master respecting interest and stock belonging to a Foreign Lunatic is provided for by section 85 of the Lunacy Regulation Act, 1853—(16 & 17 Vic: c. 70).

Lunacy Regulation Act.

16 & 17 Vic: c. 70, s. 85.

The Master shall be at liberty without order of reference, to enquire and report whether or not any person residing out of England and Wales, and where, has been declared idiot, lunatic, or of unsound mind, and whether or not his personal estate, or some and what part thereof, has been

16 & 17 Vic: c. 70, s. 85.

Enquiry by the master

vested in a curator or other and what person appointed for the management thereof, according to the laws of the place where the person is residing and whether or not any and what stock, portion of the capital stock, or share of any and what Company or Society, is standing in the name of or is vested in that person and what is his interest therein.

And by section 141, the Lord Chancellor is invested with *discretion* to order the transfer to the Curator of the dividends, and the *corpus*.

16 & 17 Vic: c. 70, s. 141.

s. 141. *Discretion of Lord Chancellor to make order of transfer.*

Where any stock, or any portion of the capital stock or any share of any Company or Society whether transferable in books or otherwise, is standing in the name of or vested in a person residing in England and Wales, the Lord Chancellor intrusted as aforesaid, upon proof to his satisfaction that the person has been declared idiot, lunatic, or of unsound mind, and that his personal estate has been vested in a Curator or other person appointed for the management thereof, according to the laws of the place where he is residing, may order some fit person to make such transfer of the stock or such portion of the capital stock or share as aforesaid or any part or parts thereof respectively, to or into the name of the Curator or other person appointed as aforesaid or otherwise, and also to receive and pay over the dividends thereof, as the Lord Chancellor intrusted as aforesaid may think fit.

In *re Sottomayor*, the lunatic, Portuguese by birth and domicil, and with nearly all his property in Portugal, was resident in England; a petition for enquiry was presented in England by some relations, and another in Portugal by his wife. The Portuguese Court issued a request to the English Courts to make an enquiry. The wife also applied here to have an enquiry as to the time when the lunacy commenced, it being desired by the Portuguese Courts that such an enquiry

re Sottomayor. L. R. 9 Ch: 677.

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should be made in England. It was held, that *James and Mellish, LL.J.* although it was 'a sort of duty, according to the 'Comity of Nations, for the English Court to 'comply, as far as possible, with the request of the 'Portuguese Court, and to endeavour to ascertain 'as far as possible, what that Court wished ascer-'tained,' yet that they would not direct such an enquiry in this case, as it was not required for any purpose of the proceedings in England, and because the finding would doubtless be taken by the Portuguese Courts to conclude other parties who could not effectually intervene in the enquiry. (James and Mellish, LL.J.)

Should the occasion arise, it is evident that the finding in lunacy by the Foreign Court might be attacked in the same manner as a Foreign Decree of Divorce.

Sawyer v. *Sloan.*

The effect of a foreign finding in Lunacy was considered by the Scotch Courts in *Sawyer* v. *Sloan* (Sc : Ses : Ca : 4th Ser : Vol : III., p. 271).

III. GUARDIANSHIP.

Guardianship.

The practice of paying complete respect to the appointment of guardians by Foreign Courts has gradually grown into the system of English law; and indeed there seems to be no reason why the general theory of Foreign Judgments should not be applicable to these appointments, which are in fact *quasi*-judgments. This was Lord Cranworth's opinion: When his Lordship, in the *Marquis of Bute's case*, was discussing the decision in *Johnson* v. *Beattie*, he said that although that case did not decide that our Courts were absolutely bound to follow the foreign appointment, 'perhaps it might 'have been a decision more consonant with the 'principles of general law to have held that every 'country would recognise the status of guardian 'in the same way as it undoubtedly would recognise 'the status of parent, or the status of husband and 'wife.'

The foreign appointment usually followed in England.

Ld: Cranworth.

Ms: Bute's case. 9 H. L. ca: 440.

Johnson v. *Beattie.* 10 Cl: & Fin: 42.

Review of the cases.

The cases in which the point has arisen are the following:—

Ex parte Otto Lewis:—The Senate of Hamburg had found a man *non compos mentis*, and had appointed a guardian or curator. An action being brought on the 4 George II. c. 10:—'That 'all persons being lunatic, or the committee of such 'persons, shall convey;' the guardian appointed in Hamburg was ordered by Lord Hardwicke to convey.

exp: Lewis. 1 Vez: Sen: 208.

Ex parte Watkins:—The Governor of the Leeward Islands had appointed guardians: It was held that the appointment failed as soon as the infant came to England; another guardian was therefore appointed.

exp: Watkins. 2 Vez: Sen: 470

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Lord Campbell, L.C., in *Johnson* v. *Beattie*, explained that this case really was not against the principle of the conclusiveness of the appointment, for 'we are not informed in the slightest degree 'what was the nature of that appointment: the 'infant may have been domiciled in England; or 'might have had property in England and nowhere 'else.' *Ld: Campbell.*

Potinger v. *Wightman.* 3 Mer: 67.

Potinger v. *Wightman*:—The widow was appointed guardian of the children by the Royal Court of Guernsey, and she came to England with the children: The question being what law should govern the succession, it was held that the English Law was the *lex domicilii*, because the children's domicil followed the mother's, unless there were fraud. But that fraud might be presumed where no reasonable cause appeared for the removal.

Johnson v. *Beattie.* 10 Cl: & Fin: 42.

Johnson v. *Beattie*:—In this case the Lords were not unanimous: the effect of the decision however was that 'the status of guardian not being a status 'recognised by the law of this country unless con- 'stituted in this country, it was not a matter of 'course to appoint a foreign guardian to be English 'guardian—but that it was only a matter to be 'taken into consideration.' (Lord Cranworth—*Stuart* v. *Bute.*) *Ld: Cranworth.*

The case did not go to either extremity by holding that the appointment was to be absolutely followed, or absolutely ignored.

Dawson v. *Jay.* 3 De G. M. & G. 764.

Dawson v. *Jay*:—The appointment of the Foreign Guardian was ignored; but the case may be thus explained:—'The infant came to England with 'the entire concurrence of the guardian originally 'appointed by the Supreme Court of New York, 'who continued guardian at the time of the 'removal: It was another guardian, afterwards *Ld: Campbell.*

'appointed with doubtful regularity, who wished to 'get possession of the infant and carry her back 'to America.' (Lord Campbell, L.C., *Stuart* v. *Bute*.)

Ms: Bute's case. *The Marquis of Bute's case.* (*Stuart* v. *Bute*. *Stuart* v. *Moore*):—In this important case nearly all the authorities were reviewed and explained, especially *Johnson* v. *Beattie*. The Lords were unanimous in acknowledging the foreign guardian.

9 H. L. ca: 440. *Johnson* v. *Beattie.* 10 Cl: & Fin: 42.

Ld: Campbell. Lord Campbell, L.C., said:—'An alien father 'whose child had been so carried away from him 'and brought into England, would undoubtedly 'have the child restored to him in England by writ 'of *habeas corpus*: and I believe that the same 'remedy could be afforded to a foreign guardian 'standing in *loco parentis* on the ravishment of his 'ward.'

See the *Marquis of Bute's case* before the Court of Session. (Sc: Ses: Ca: 2nd Ser: Vol: xxii, p. 1504.)

Wood, V.C. *Nugent* v. *Vetsera*:—'I think,' said Wood, V.-C., 'having regard to the principles of International 'Law, and the course that all Courts have taken 'of recognising the proceedings in other countries 'of regularly constituted tribunals, provided these 'other countries be civilised communities, especially 'if they are communities with which we are in 'amicable connexion, as we are with the Empire of 'Austria, it is impossible for me to disregard the 'appointment by an Austrian Court of this guar- 'dian to these children, who are Austrian subjects, 'children of an Austrian father, merely because this 'guardian has continued the course which those 'who preceded him in that office adopted—sending 'their wards for a certain time over here for educa- 'tion in this country.'

Nugent v. *Vetsera.* L. R. 2 Eq: 704.

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But on very special grounds the English Courts will act against the Foreign guardians; as for instance, neglect of the children; or danger to their property. Grounds for not following Foreign appointment.

From these cases it will be gathered that the practice of the Courts with regard to guardians appointed by Foreign Courts agrees with the general theory of Foreign Judgments; and we have, in this custom, a practical illustration of the doctrine of the auxiliary sanction:—

The guardian, possessed of rights given to him by a Foreign Court, in virtue of the office with which it has vested him, is clothed by the English Courts with an auxiliary office or guardianship, by which he is enabled to exercise those rights in this country. Guardianship a practical illustration of the auxiliary sanction.

IV. PROBATE.

One of the most recent expositions on the subject of the admissibility and conclusiveness of Foreign Probates in the English Probate Court, was given by Sir James Hannen in *Miller* v. *James*. In that case the executor propounded a will alleging that the deceased died domiciled in Jersey, and that Probate had been granted by a competent Court in Jersey. The next of kin pleaded undue execution; incapacity; and undue influence. The learned Judge said:—'It is the established practice 'that where a will has been proved in a foreign 'Court, a duly authenticated copy will be admitted 'to probate in this country without further evidence 'of the validity of the will, as it is presumed that 'the Foreign Court has been satisfied on that 'point. It was said in argument that the validity 'of this will might be put in issue because it had 'been proved only in Common Form in Jersey. 'But it is to be borne in mind that the expressions 'in Common Form and in Solemn Form are not 'necessarily appropriate to foreign probates, and 'the Court here is not entitled to take upon itself 'to determine whether the Court of the place of 'the domicil has adopted sufficient means to in-'vestigate the validity of wills to which it has 'given its official sanction. For these reasons I 'am of opinion that the pleas objected to must be 'struck out, and the defendants must seek their 'remedy by application to the proper Court, what-'ever that may be, having jurisdiction to revoke 'the probate which has been granted.'

Miller v. *James*. L. R. 3 P. & D. 4.

General application of the theory of the conclusiveness of Foreign Probate. *Sir J. Hannen.*

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This judgment is in every respect in accordance with the general Theory of Foreign Judgments.

In the earlier cases there appears to have been a slight hesitation on the part of the Courts as to whether they were bound 'in all cases, and under 'all circumstances, to follow the grant of probate 'made by a Court of competent jurisdiction.' Review of earlier cases.

Larpent v. *Sindry.* 1 Hagg: E. R. 383.

This doubt was expressed in *Larpent* v. *Sindry*, *in the goods of Read*, and in *Viesca* v. *D'Arambura*. In these cases however the foreign probate was followed: in the last, Sir Herbert Jenner said that he did not know whether the decree of the Court of Cadiz were binding on the Prerogative Court of Canterbury: but that if it were discretionary, he would follow it for its convenience. *Sir H. Jenner.*

goods of Read. 1 Hagg: E. R. 474.

Viesca v. *D'Arambura.* 2 Curt: E. R. 277.

The following cases support the doctrine that the English Court will pronounce in favour of the will, or that the deceased died intestate, according as that question is determined by the foreign Court:— Cases in support of conclusiveness of probate.

[1] 1 Add: E. R. 25. *Hare* v. *Nasmyth.*[1]

[2] 1 Hagg: E. R. 237. *in the goods of De Cunha.*[2]

[3] 1 Hagg: E. R. 548. *in the goods of Cringan.*[3]

[4] 1 Curt: E. R. 904. *in the goods of Stewart.*[4]

[5] 2 Curt: E. R. 656. *in the goods of Rogerson.*[5]

[6] 8 Cl: & Fin: 1. *Preston* v. *Lord Melville.*[6]

[7] 31 L. J: Ch: 402. *Enohin* v. *Wylie.*[7]

[8] 32 L. J: P. & M. 109. *Crispin* v. *Doglioni.*[8]

[9] 33 L. J: C. P. 78. *Vanquelin* v. *Bouard.*[9]

[10] L. R. 1 P. & D. 450. *in the goods of Earl.*[10]

[11] 16 W. R. 1130. *in the goods of Smith.*[11]

[12] 38 L. J: P. & M. 48. *in the goods of Guttierez.*[12]

In the goods of Smith, Lord Penzance (then Sir J. P. Wylde) said:—'It is a general rule on which 'I have already acted, that where a person dies. 'domiciled in a foreign country, and the Court of *Sir J. P. Wylde.*

goods of Smith. 16 W. R. 1130.

'that country invests anybody, no matter whom, 'with the right to administer the estate, this Court 'ought to follow the grant simply because it is the 'grant of a foreign Court, without investigating the 'grounds on which it was made, and without refer- 'ence to the principles on which grants are made 'in this country.'

goods of Smith. 16 W. R. 1130.

The Foreign Probate indeed will be followed even where the English Courts would have hesitated. (*in the goods of Rogerson.*)

goods of Rogerson. 2 Curt: E. R. 656.

There is one case however in which, at first sight, this doctrine appears not to have been followed :—*in the goods of H.R.H. the Duchess of Orleans.*

goods of Orleans. 1 Sw: & Tr: 253.

H.R.H. Duchess of Orleans' case.

In the first place, the general principle was recognised that the Probate Court, in granting administration of the effects of a person who died domiciled abroad, generally follows the law of the domicil; and usually also any decree pronounced by the *forum domicilii* in accordance with that law.

Foreign Administration granted to minor.

Sir C. Cresswell.

But the foreign administration had been granted to a minor: (*i.e.*, a minor according to the *lex domicilii*). Sir C. Cresswell said :—'Is there any 'instance of the Courts of this country, whilst 'following the law of the domicil, doing something 'contrary to their own law: *e.g.*, as is now asked, 'granting administration to a minor, who cannot 'take upon himself the liabilities which the English 'law casts on administrators?'

Principle apparently deducible from the case.

The principle *apparently* deducible from this case is therefore, that the Foreign Probate will not be followed in cases where the English Courts would, by granting an English Probate, be proceeding contrary to English law.

goods of Earl. L. R. 1 P. & D. 150.

Sir J. P. Wylde *in the goods of Earl*, discussing the application of the doctrine of conclusiveness as applied to probate, drew a distinction between the

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practice of the old Prerogative Court and that of the Probate Court:—'The result of the cases is 'that in the Prerogative Court the tendency was to 'follow the foreign grant where it could be done, 'but there was a reluctance to lay down any abso-'lute rule in the matter, while the decisions in the 'Court of Probate have militated against the rule 'of following the foreign grant.' The only case cited in support of this proposition as regards the Probate Court was that of the Duchess of Orleans. But it is very doubtful whether the Court has ever directly negatived the doctrine: in *Laneuville* v. *Anderson* it appears to have generally approved of it.

Sir J. P. Wylde.

Laneuville v. Anderson. 30 L. J: P. & M. 25.

Let us examine the *Duchess of Orleans' case* more attentively: If the real principle deducible from the decision be that which is stated above, it appears also to militate against the principle laid down in the Chapter on Defences—that an error in English law, where the case is to be decided by the English law, will not (so long as it is not a wilful error) be sufficient ground for our Courts to refuse to be bound by the Foreign Judgment; although the enforcing of such a judgment must necessarily be equivalent to acknowledging a right to exist in England, not in accordance with English law. It is suggested however that the case is governed by a very different principle.

Examination of this principle.

Ds: of Orleans' case. 1 Sw: & Tr: 253.

An administrator is, strictly speaking, an officer of the Court, appointed by the Court (following, where it is possible, the expressed intention of the testator; or rather, whose appointment by the testator is sanctioned by the Court), to administer the estate of the deceased. His appointment is intimately connected with the procedure of the Court; and the law which governs procedure—even with

An administrator being an officer of the Court, his appointment is governed by the *lex fori*.

regard to Foreign judgments—is always the *lex fori*. The English Probate Court therefore will not follow the Probate of the Foreign Court so far as the appointment of the administrator is concerned, if he is a person—for example, a minor—who cannot under the English procedure perform the duties of the office.

Foreign appointment not followed if person incapable of performing duties of office in England.

This appears to be the real principle deducible from the case of the Duchess of Orleans, and it agrees with the rules relating to Foreign Judgments proceeding on Statutes of Limitation. It is indeed the best illustration of the necessity that the *lex fori* should govern all questions of procedure: For supposing in this case the Foreign Probate had been followed, and administration granted to the minor—the Comte de Paris—it would have been comparatively useless; for (leaving out of the question the English law against the appointment of minors as administrators) he could in no case have bound himself by a deed.

Suggested as the real principle of the case.

Minority.

[The minority of a person, it must be remembered, depends upon the law of his domicil. If he is a major in his own country, he will be considered a major in this country, irrespective of whether he is twenty-one or not. The Comte de Paris was an emancipated minor, but had not reached his majority, which in France is, as in England, twenty-one years.]

Probate followed *quâ* validity of will.

But the Foreign Probate, so far as the validity of the will is concerned, will be followed, and administration granted to the proper person. (*in the goods of Cosnahan.*)

goods of Cosnahan. L. R. 1 P. & D. 183.

Sir C. Cresswell.

Election of guardian by minor appointed

'According to the practice, the only person whom 'a minor is entitled to elect is his next of kin. The 'Queen Dowager would therefore be the proper 'person for the Comte de Paris to elect as guardian,

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'and if he does so' (which course was afterwards adopted), 'I shall have no hesitation in granting 'administration to her.' (*Sir C. Cresswell.*) administrator.

goods of Earl. L. R. 1 P. & D. 150.

Sir J. P. Wylde continued, *in the goods of Earl*:— 'There was no power in the old Ecclesiastical 'Courts to make a grant except in the direction 'indicated by the practice of those Courts. The 'Court of Probate however is armed with a special 'power by the 73rd section of 20 and 21 Vic: 'c. 77.' *Sir J. P. Wylde.* Powers of Probate Court under 20 & 21 Vic: c. 77 s. 73.

20 & 21 Vic: c. 77. s. 73.

Where a person has died or shall die wholly intestate as to his personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who if this Act had not been passed would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory on the Court to grant administration of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court in its discretion to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

'I think the Court ought to act upon that section, 'and to make a grant in all such cases as the pre- 'sent to the person who has been clothed by the 'Court of the country of domicil with the power 'and duty of administering the estate, no matter 'who he is, or on what ground he has been clothed 'with that power.' *Sir J. P. Wylde.*

The grant under s. 73.

'The grant under the 73rd section will describe 'him as a person having that power, and thus the 'difficulty will be avoided of declaring that a per- 'son is executor who according to the practice of 'the Court is not executor, and of continuing a 'chain of executorship by persons who are execu- 'tors according to the law of a foreign country, but 'not according to the law of this country.'

Ground for attacking probate: *lex domicilii* not followed.

From the cases that have been cited, and from many other decisions decreeing Probate merely, where no Probate had been originally granted by a Foreign Court, it will be gathered that a Foreign Probate may be attacked successfully on the ground that the law of the domicil has not been followed with respect to the administration of the personal estate of a deceased person :—'The utmost confu- 'sion must arise, if, where a testator dies domiciled 'in one country, the Courts of every other country 'in which he has personal property should assume 'the right, first, of declaring who is the personal 'representative, and next, of interpreting the will and 'distributing the personal estate situate within its 'jurisdiction according to that interpretation. There 'might be as many different personal representatives 'of the deceased and as many varying interpretations 'of his will as there are countries in which he is 'possessed of personal property. It was to prevent 'this that the law of the domicil was introduced 'and adopted by civilised Nations.' (Lord West- bury, L.C.—*Enohin* v. *Wylie*. See also *Pipon* v. *Pipon*.)

Ld: Westbury.

Enohin v. *Wylie*. 31 L. J: Ch: 402.

Pipon v. *Pipon*. 1 Ambl: 25.

Breach of International Law.

Here then we have another breach of International Law. Jurisdiction to grant probate being assumed by the Foreign Court contrary to the rules adopted by civilised nations: So universal is the rule which the Foreign Court has violated ; or, if sanctioned by the laws of the country, so un-

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wisely has that country exercised its discretion, that the English Courts are justified in refusing to follow the foreign grant of probate.

We have here another very practical illustration of the Theory of the Auxiliary Sanction:—The Foreign Probate, which of itself would be useless in this country, is clothed with an English Probate which is auxiliary to it, and by which it is made effectual here.

Probate a practical illustration of theory of auxiliary sanction.

Laneuville v. *Anderson.* 30 L. J: P. & M. 25.

cf: Sir C. Cresswell in *Laneuville* v. *Anderson*:—'In granting 'probate here of a foreign will, the Court is auxiliary to the 'Courts of the testator's country;'

Sir C. Cresswell.

Enohin v. *Wylie.* 31 L. J: Ch: 402.

and Lord Westbury in *Enohin* v. *Wylie*:—

'When the Court of Probate was satisfied that the testator 'died domiciled in Russia, and that his will containing a 'general appointment of executors had been duly authenti- 'cated by those executors in the proper Court in Russia, it 'was the duty of the Probate Court in this country at once 'to have revoked the former letters of administration which 'had been granted, and to have clothed the Russian executors 'with auxiliary letters of probate to have enabled them to 'get possession of that personal estate which was situate in 'England.'

Ld: Westbury.

re MacNichol. L. R. 19 Eq: 81.

In re MacNichol — MacNichol v. *MacNichol* is another instance of the respect paid by the English Courts to a Foreign Administrator duly appointed. A judgment had been obtained in a Foreign Country by the Foreign Administrator of a creditor against an English debtor who had since died, and whose estate was being administered in England. Malins, V.C., held that the foreign administrator could prove his debt without taking out English administration to his intestate.

V. BANKRUPTCY.

Bankruptcy.

Lastly, we must consider what respect will be paid to the bankruptcy proceedings of another country.

Proceedings in bankruptcy consist of two parts,—the adjudication, and the discharge:—And as the Court of Bankruptcy makes an order at each of these stages, both the adjudging the person to be bankrupt, and the final discharge from his debts and obligations may be considered, for the purpose of this treatise, strictly as judgments of the Court.

Division of the subject.

The international effect of bankruptcy will therefore be considered under the following heads:—

i. The adjudication and assignment.
   - *α.* the effect of a foreign adjudication in England.
   - *β.* the effect of an English adjudication abroad.

ii. Pendency of the proceedings during the interval between the adjudication and final discharge.

iii. The final discharge, and its effect on the bankrupt's obligations.
   - *α.* where the discharge is by the Courts of the country of the contract.
   - *β.* where the discharge is by the Courts of any other country.

and lastly

iv. the personal status of the bankrupt.

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i. THE ADJUDICATION AND ASSIGNMENT. The adjudication and assignment.

a. The effect of a Foreign adjudication in England.

Effect of a foreign adjudication in England. *Story.* §§ 403—409.

The general principle is that the Foreign assignment will be recognised in England, even if the property of the bankrupt has been attached by an English creditor after the adjudication in bankruptcy, with or without notice of the foreign proceedings.

re Blithman. L. R. 1 Eq: 23.

In *re Blithman* the bankrupt was entitled to a share of residue, consisting of a sum in Chancery in England; he had been adjudged insolvent under an Act of the Australian legislature, by which personalty of insolvents vests in the trustees by virtue of their appointment. The fund was claimed both by the assignees and by the executrix.

It was argued that as there had been an insolvency abroad, it was equivalent to a foreign judgment, and the Court would by Comity give effect to it, irrespective of the question of domicil. To this argument Romilly, M.R., said he was disposed to assent; but not so as to give effect to it in the way asked by the petition:—'I think that 'the legal personal representative must receive the 'fund in the first instance, and that the assignees 'can only obtain payment here by suing for the 'amount. If a person domiciled in England had 'in his life contracted debts abroad, for which a 'foreign judgment had been obtained, the judgment 'creditor might sue the legal personal representa-'tive here for the debt: but questions of priority 'might then arise between the foreign judgment 'and other judgments here; those could only be

Romilly, M.R.

'settled in a regular suit against the representa-'tive.'

Full effect was therefore to be given to the foreign assignment, but it was to be treated exactly as any other foreign judgment, and an action brought upon it.

This case lays the foundation of the doctrine which received its completion in *re Davidson's Settlements*. James, L. J., held that irrespective of the question of domicil, the fact of there having been an adjudication in insolvency in Queensland, and there being debts proved in the insolvency still unsatisfied, rendered it necessary that a sum of money paid into Chancery in England to the credit of the insolvent should be applied towards payment of the debts proved in Australia, in priority to any claim by an English administrator.

James, L.J.

re Davidson's Settlements. L. R. 15 Eq. 383.

Conclusions. Effect of notice of foreign bankruptcy during proceedings in England.

The conclusions may be stated to be, that if during the course of English proceedings affecting personal property, notice is given that the owner of the property has been adjudicated bankrupt by a foreign Court, the English Court will recognise, and, if requested, will give effect to the foreign adjudication, by staying the English proceedings; and in a suit by the foreign trustees, by ordering the property to be handed over for the benefit of the creditors under the foreign insolvency:—

After proceedings terminated.

And that, even if the English proceedings have terminated, and the property has been attached in ignorance of the insolvency abroad, yet that insolvency will be recognised, and effect will be given to it in an action by the trustees against the attaching creditor, on the foreign order of insolvency as on a foreign judgment.

Assumed jurisdic-

Where jurisdiction in bankruptcy has been assumed by the Foreign Court, it is presumed

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that the question must be considered in the same manner as assumed jurisdiction in other cases. tion in bankruptcy. cf: p. 88.

The principle must be taken to apply to personal property alone: As regards realty, the rule that it must be governed by the *lex rei sitæ* is of universal application, and it cannot therefore be considered to pass to the assignees under an adjudication of a foreign Court; although the laws of the foreign state should assume to vest such property in the persons appointed to collect the bankrupt's estate,—as would appear to be the case under the 15th section of the English Bankruptcy Act of 1869—(32 & 33 Vic: c. 71). Realty. cf: *Story.* § 428. 32 & 33 Vic: c. 71, s. 15.

Solomons v. *Ross.* 1 H. Bl: 131n.

'In *Solomons* v. *Ross*, money attached by an individual creditor after an assignment in Holland, 'was decreed by Lord Hardwicke to be paid to the 'attorney of the assignees for the benefit of the 'creditors; plainly considering each creditor as 'bound by the assignment, and the money recovered 'here as referable to Holland, the country of the 'debtor. The same is to be inferred from *Jollet* v. '*Deponthieu* and *Neale* v. *Cottingham.*' (Majority 'of the Court—*Phillips* v. *Hunter.*)

Jollet v. *Deponthieu.* 1 H. Bl: 132n.

Neale v. *Cottingham.* 1 H. Bl: 132n.

Phillips v. *Hunter.* 2 H. Bl: 402.

'The determinations of the Courts of this country 'have been uniform to admit the title of foreign 'assignees: As in *Solomons* v. *Ross* and *Jollet* v. '*Deponthieu*, where the laws of Holland, having, in 'like manner as a commission of bankrupt here, 'taken administration of the property, and vested it 'in the curators of desolate estates, the Court of 'Chancery held that they had immediately on 'their appointment a title to recover the debts due 'to the insolvent in this country, in preference to

Ld: Loughborough, C.J.

'the diligence of the particular creditor seeking 'to attach those debts.' (Lord Loughborough, C.J. —*Sill* v. *Worswick*.)

Sill v. Worswick. 1 H. Bl: 665.

Peculiar rights of foreign trustees recognised.

Further, if any special or peculiar right is given by the foreign law to the trustees, the English Courts will respect it;—As in *Alivon* v. *Furnival*, where the right of two out of three syndics to sue under a French bankruptcy was recognised.

Alivon v. *Furnival.* 3 L. J: Ex: 241.

β. The effect of an English adjudication abroad.

Effect of English adjudication abroad.

In countries where the same principles as to the recognising foreign judgments obtain as in England, there is no doubt that an English assignment in bankruptcy will be acknowledged.

Story. §§ 403—409.

Ld: Loughborough, C.J.

'If the bankrupt happens to have property which 'lies out of the jurisdiction of the law of England; 'if the country in which it lies proceeds according 'to the principles of well-regulated justice, there is 'no doubt but that it will give effect to the title of 'the assignees' (Lord Loughborough, C.J., *Sill* v. *Worswick*.) See also *Le Chevalier* v. *Lynch*, in which case Lord Mansfield said:—'If a bankrupt 'has money owing to him out of England, the 'assignment under the bankrupt laws so far vests 'the right to the money in the assignees, that the 'debtor shall be answerable to them and shall not 'turn them round by saying he is only accountable 'to the bankrupt'; and *ex parte Blake* in which it appeared that the American Courts had not recognised an English assignment; Lord Thurlow said:—'I had no idea of any country refusing to take 'notice of the rights of assignees under our laws: 'and I believe every country on earth would do it.'

Ld: Mansfield, C.J.

Le Chevalier v. *Lynch.* 1 Dougl: 170.

exp: Blake. 1 Cox Eq: 398.

Ld: Thurlow.

Judgment abroad without regard to, or in

But where, either without regard to, or in ignorance of the English assignment, there has been a judgment by attachment given abroad, great complica-

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tions arise; and the form of the enquiry in reality is:—What respect is to be paid to the foreign judgment under such circumstances?

ignorance of, English assignment.

What respect to be paid to it?

If intimation of the English bankruptcy is given to the Foreign Court, it ought, as we have seen, to respect it, and not allow the suing creditor to attach the property:—But if, although intimation is given, yet the Foreign Court disregards it and the attaching creditor recovers, both Story and Westlake are agreed that the English Courts will abide by the foreign decision; 'if the local laws (however incorrectly on principle) confer on him an absolute 'title':—'Although,' adds Story, 'it *should* be 'disregarded.'

Story. § 409.

Nationality of party.

This agrees with the general theory of Foreign Judgments: But here a distinction is drawn dependent upon the nationality of the party who has recovered under the foreign judgment. If the creditor be an Englishman, he will be held to have recovered to the use of the assignees.

Where the judgment recovered by an Englishman.

Difference between English and foreign creditor.

The principle upon which this distinction rests seems to be that the English creditor should have, and perhaps has, proved under the English Commission:—The object of his suit in the foreign Court is therefore to obtain an unfair advantage, which the English Courts, proceeding on the principle of equality among the creditors, will not allow him to retain. But the case of the foreign creditor is different: In seeking to attach the property, he is only pursuing his legal remedy; and not being subject to the English laws, he does not endeavour thereby to avoid any obligation under them. He may indeed prove under the English Commission; but, as we shall see, he will be compelled, if he does so, to bring into the general fund any money he may have already recovered.

Before considering the cases, it will be necessary to carry the doctrine one step further:

Notice immaterial in case of Englishman.

It is immaterial, in the case of an English creditor, whether the trustees gave notice of their claim to the Foreign Court, or not:—for the question of notice cannot affect the motives of the creditor in attaching the property by the aid of the Foreign Court.

The leading cases upon the point are *Sill* v. *Worswick* and *Phillips* v. *Hunter* [on appeal from s. c. *sub nom: Hunter* v. *Potts*]. The doctrine was also acted upon in Ireland in *re Robinson.*

Sill v. *Worswick.* 1 H. Bl: 665.
Phillips v. *Hunter.* 2 H. Bl: 402.
Hunter v. *Potts.* 4 T. R. 182.
re Robinson. 11 Ir: Ch: Rep: 385.

Majority of the Court in *Phillips* v. *Hunter.*

In *Phillips* v. *Hunter* the majority of the Court—Macdonald, C.B., Thompson, Perryn, Hotham, BB: Rooke, Heath, JJ:—held that, with or without notice by the assignees, an English creditor, having recovered money by process of attachment in a foreign country, received it to the use of the English assignees.

Eyre, C.J. dissent:

Eyre, C.J., however dissented, treating the question on the general principles of the recognition of foreign judgments, and refusing to take into consideration the fact that the judgment had been obtained in contravention of the English Laws. But this principle always has been recognised, and to such an extent that in *Macintosh* v. *Ogilvie* 'Lord Hardwicke, by a writ of *ne exeat* 'prevented the creditor from going to sue in Scot- 'land after the bankruptcy. By giving this pre- 'ventive remedy against an unconscientious prefer- 'ence, which one creditor might have obtained over 'the others, his Lordship must be understood to 'say that the creditor was bound, as far as the 'circumstances would enable him to apply them, 'by the bankrupt laws of this country; and had 'that creditor effectuated his payments in Scotland, 'it would seem that his Lordship, in order to be

Macintosh v. *Ogilvie.* cit: 4 T. R. 191.

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'consistent, would have obliged him to have 'accounted with the assignees if the fund had been 'brought within his jurisdiction.' (Majority of the Court—*Phillips* v. *Hunter*.)

Phillips v. *Hunter*. 2 H. Bl: 402.

Lord Chief Justice Eyre however ridiculed the proposition that a British subject shall not be allowed to contravene a British Act of Parliament:—'It is a specious and very splendid pro- *Eyre, C.J.* 'position' he said, 'but it is not solid; and if it 'were solid, it concludes nothing towards the 'support of this action. As a proposition in 'ethics, I have no objection to it; but considered 'as a proposition of law, it is too general, concluding, 'as I have before observed, in nothing.' 'It was 'well said in the argument, you admit an American 'might in this case have pursued his legal diligence 'in the Courts of his own country, notwithstanding 'our bankrupt laws, and that you could not have 'taken from him the money recovered, and given 'it to the assignees: Will you then compel a 'British subject to sit still and see the foreigner 'exhaust that fund, which might have satisfied his 'debt and so far relieved the fund for the creditors 'at home? I have heard no answer to that 'question.'

The answer seems to be that it would be the duty of the assignees to get possession of the money for the benefit of the creditors.

The judgment not in reality disregarded.

It must however be noticed that the majority of the Court declared that the judgment was not disregarded, but rather regarded; for since the money recovered, if retained by the plaintiff, would be in contravention of an Act of Parliament, and the recovery therefore must be taken to be for the use of the assignees, yet the judgment was still final and conclusive *between the parties*:—'In an action

'for money had and received, the receipt shall be 'always deemed to enure to the use of him who 'hath the right, even though it be taken in an 'adverse title.' To this Eyre, C.J., replied, that, 'upon a judgment recovered and executed, which 'for the sake of argument I suppose ought not to 'have been recovered, an action for money had and 'received will not lie for anybody, not even for the 'person against whom the judgment has been so 'unjustly recovered.'

Judgment recovered by a foreigner.

The last question to be considered is—Will a foreigner who has recovered without notice of the English bankruptcy be held to have recovered to the use of the trustees?

Westlake.

To this Westlake gives an affirmative answer; but Story does not distinguish this from a recovery by a foreigner with notice, in which case, it will be remembered, the foreign judgment will be respected. Eyre, C.J., in *Phillips* v. *Hunter* did not approve of the principle that the foreigner should be held to have recovered to the use of the trustees; nor did Lord Loughborough, C.J., in *Sill* v. *Worswick*.

Phillips v. *Hunter*. 2 H. Bl: 402.

Sill v. *Worswick*. 1 H. Bl: 665.

Division of subject for consideration: *a.* English trustee going abroad.

Let us consider first what would result from the English trustee going abroad to recover the debt: He finds it has been already recovered by a foreign creditor before notice could have been given: it must be very doubtful whether the creditor would be compelled to refund to the trustees; for the foreign Courts cannot be expected to take notice of the policy of our Bankruptcy Laws, the insuring of absolute equality among the creditors: which policy alone guides our Courts in holding the English creditor to have recovered to the use of the trustees, so as to prevent his obtaining a larger proportion of his debt than the other creditors.

Policy of English Bankruptcy Laws.

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β. Foreign creditor coming to England after recovery.

Next, let us consider what would be the effect of the foreign creditor, who has recovered abroad without notice, coming into this country. The same result seems to be arrived at: For when the English creditor sues pending a bankruptcy, the law presumes him to sue as trustee for the other creditors, wherever the action may be brought: but this presumption cannot be raised in the case of a foreign creditor who does not choose toprove under the English Commission.

Nevertheless, an English creditor having recovered a debt in the English Courts against a person who has been declared insolvent by a Foreign Court, and of which insolvency no notice has been given, will be held liable to refund at the suit of the foreign trustee.

The paragraph from Westlake is as follows :—

Westlake.

4. And lastly, we may probably add that if no intimation was given previous to the completion of the recovery by attachment, the same presumption—(that the money was recovered to the use of the assignees)—will be raised, and the creditor, *whether foreign or English*, compelled to refund, although the law of the place of attachment might refuse efficacy to such intimation even if given *pendente lite*.

Hunter v. *Potts*. 4 T. R. 182. *Sill* v. *Worswick*. 1 H. Bl: 665. *Phillips v. Hunter*. 2 H. Bl: 402.

[At least no enquiry seems to have been made about the law of the place of attachment in *Hunter* v. *Potts*, *Sill* v. *Worswick*, or *Phillips* v. *Hunter*; and the distinctions there suggested on the creditor's nationality refer only to the case of an intimation actually given.]

ii. Injunctions during the Pendency of Bankruptcy Proceedings.

Injunctions pending proceedings.

Power of Court to

During the pendency of the bankruptcy proceedings and before the final order of discharge, the Court will protect the bankrupt from any vexatious

protect bankrupt.

harassing on the part of his creditors, under section 13 of the Bankruptcy Act, 1869.

32 & 33 Vic: c. 71, s. 13.

32 & 33 Vic: c. 71, s. 13. *Power of Court to restrain proceedings against bankrupt.*

The Court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution or other legal process against the debtor in respect of any debt proveable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed upon such terms as the Court may think just. The Court may also, at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented or of any part thereof, and may direct immediate possession to be taken of such property or business or any part thereof.

Protection against foreign creditors.

The question we have to consider is, how far the English Court is able to protect the bankrupt from proceedings taken by his foreign creditors in foreign Courts.

The discussion under the head of Injunctions and the plea *lis alibi pendens* must be remembered :—It is presumed that the principles there enunciated will, so far as they are applicable, bear upon the point now under consideration : Their application will be to those bankruptcy cases in which there exists an identity of parties : that is, where the person who is sought to be restrained from suing is a party to the English bankruptcy.

Identity of parties.

Applications for injunction where foreign creditor not party to bankruptcy.

Attempts have however been made to induce the Court to issue an injunction to restrain foreign creditors from suing in a foreign Court, irrespective of the question whether they have proved under the English Commission. Lord Cranworth, L.C., in *Maclaren* v. *Stainton*, *Maclaren* v. *the Carron Iron*

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Maclaren v. *Stainton* *Maclaren* v. *Carron Co*: 26 L. J: Ch: 332. *re Chapman*. L. R. 15 Eq: 75.

Co: said that 'there must be a very strong case to 'induce the Court to restrain a foreigner, domiciled 'in another country, from proceeding to obtain 'payment of debts according to the law of the 'country in which he is domiciled, thus appearing 'to admit the possibility of such an injunction 'being granted; but, as was pointed out by Bacon, C.J., in *re Chapman*, the Court will not make an order which must of necessity be *brutum fulmen*, as it has no means of enforcing its order against the foreigner.

Pennell v. *Roy*. 3 De G. M. & G. 126.

The Court acted upon this principle in *Pennell* v. *Roy*: An action was brought by a Scotch creditor in Scotland, who had not proved under the English bankruptcy, against the assignees to recover out of the bankrupt's Scotch realty an amount equal to the dividend which would have been payable on the debt: The proceedings were shown to be frivolous, but the English Court refused to interfere :— 'It is not the duty or function, or within the power 'of the Court to restrain men from prosecuting 'frivolous, litigious, and desperate suits, merely be- 'cause they are so,—at least unless the experiment 'shall have been repeated once or twice. A creditor 'who has not proved or claimed, nor seeks to prove 'or claim under an English bankruptcy, is under no 'obligation, nor owes any more duty to the assig- 'nees, or the other creditors, than he would if he 'were no creditor at all, and consequently, if he 'enters into a foolish and perverse litigation with the 'assignees, they must defend themselves as other 'men do when prosecuted by the owner of an ima- 'ginary grievance.' (Knight-Bruce, L.J.) And from Turner, L.J., we have once more a recognition of that principle which underlies the whole subject of foreign judgments :—'I have less hesitation in

Knight-Bruce, L.J.

Turner, L.J.

'refusing to grant the injunction, because it is the 'duty of this Court to give credit to foreign Courts 'for doing justice in their own jurisdiction.'

cf: p. 92.

Where foreign creditor is a party to bankruptcy.

But, if the creditor has become a party to the English bankruptcy by proving his debt under it, the Court will then have jurisdiction over him, and will therefore have the power of enforcing any order it may make against him.

This principle fully appears from the cases already quoted; it was also acted upon to some extent in the following, the only difference being that in the case of the foreign creditor, his express submission to the jurisdiction, by proving his debt, is requisite.

In *ex parte Ormiston, re Distin*, an injunction was granted against an English creditor who was suing in a foreign Court for a debt incurred in England. *exp: Ormiston, re Distin.* 24 L. T: N. S. 197.

In *ex parte Tait, re Tait*, the injunction was granted to restrain the prosecution of an action in Ireland upon a claim which, if due, was proveable under a deed of inspection; and the question necessarily to have been decided here. *exp: Tait, re Tait.* L. R. 13 Eq: 311.

Corollary.

Money already received to be brought into common fund.

As a corollary from this doctrine we have the case of *Selkrig* v. *Davis*, where it was held that a person cannot come under an English commission without bringing into the common fund any money that he may have already received abroad. *Selkrig* v. *Davis.* 2 Rose, 291.

See also *Cockerell* v. *Dickens*. *Cockerell* v. *Dickens.* 1 M. D. & De G. 45.

Bankruptcy of partners.

Identity of parties.

With regard to the bankruptcy of partners, or of persons partners in firms carrying on business in two or more different countries, the same rules hold good as to the identity of the parties to the two bankruptcies.

In *Brickwood* v. *Miller*, one of the partners of a West India firm resided in London and became *Brickwood* v. *Miller.* 3 Mer: 279.

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bankrupt. A creditor both of the firm and the partner attached property in the West Indies: he was held entitled to retain the money he had received to the extent of satisfying his joint debts, but to be accountable to the assignees for the overplus.

exp: Cridland. 3 V. & B. 94.

So, in *ex parte Cridland*, a joint commission of bankruptcy here was not superseded on the ground of a separate commission against one of the partners proceeding in Ireland.

Restrictions against double proof.

Similarly as to the restrictions against double proof.

exp: Chevalier, re Vanzeller. 1 Mont: & Ayr: 345.

In *ex parte Chevalier, re Vanzeller*, there was a process of insolvency abroad against the foreign firm, and a commission against an English partner. The foreign firm had drawn bills on the partner who was trading on his own account in England, payable to an agent of the foreign government: he was restrained from receiving dividends here, unless he elected not to prove under the insolvency abroad.

exp: Goldsmith re Deane. De G. & J. 67.

And in *ex parte Goldsmith, re Deane*, bill-holders of a firm in Pernambuco, having received a dividend under a *concordata* by Brazilian law, were held not entitled to prove under the English bankruptcy, although different rules as to distributing the joint and separate estates existed in the two countries: unless, it is presumed, the money thus received were brought into the common fund in England.

Application to expunge proof in English proceedings.

Analogous to the plea *lis alibi pendens*, is an application to expunge a proof under the English bankruptcy because the foreign creditor has already instituted proceedings in the foreign country for the recovery of his debt. This application was made in *ex parte Cotesworth, re Vanzeller*: but the Court refused to expunge the proof in the absence of all evidence as to the nature of

exp Cotesworth, re Vanzeller. 1 Dea: & Ch: 281.

the process abroad; as it did not appear whether that process was a satisfaction or security, and it would be unjust to expunge proof, and turn it into a claim:—An injunction was not asked for.

Foreign suspension recognised.

If the foreign Court has suspended a claim, this suspension will be recognised, and an action in the English Courts on the claim will be stayed. (*Frith* v. *Wollaston.*)

Frith v. *Wollaston.* 21 L. J: Ex: 108.

iii. The Final Discharge, and its Effect on the Bankrupt's Obligations.

Effect of bankrupt's discharge on his obligations.

Hitherto we have considered only the effect of bankruptcy on the bankrupt's own property, and on the debts owing to him; we now advance to the last stage of the proceedings—the order given by the Court that the debtor be discharged from his obligations.

a. Where the discharge is by the Courts of the country of the contract.

Discharge by country of contract.

The obligation extinguished.

There is no doubt that an obligation is extinguished by a discharge under the laws of the country where the contract was entered into, and that this discharge will be recognised by the Courts of every other Country.

Ballantyne v. *Golding*, Cooke's Bk: Laws, 8th ed: 487.

This principle was acted on in *Ballantyne* v. *Golding*: but in *Pedder* v. *Macmaster* it appears to have been thought an open question. It was however finally established by Lord Ellenborough, C.J., in *Potter* v. *Brown*:—'The bankruptcy and certificate would have been a discharge of the debt in 'America, and it must by the Comity of the Law of Nations be the same here.' This was followed,

Pedder v. *Macmaster.* 8 T. R. 609.

Id: Ellenborough, C.J.

Potter v. *Brown.* 5 East, 124.

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in *Quelin* v. *Moisson*, *Gardiner* v. *Houghton;* and *Clerke* v. *Emery* at Nisi Prius.

Quelin v. *Moisson.* 1 Knapp. 266n. *Gardiner* v. *Houghton.* 2 B. & S. 743. *Clerke* v. *Emery.* 1 F. & F. 446.

'The general form in which the doctrine is expressed, seems to preclude any consideration of the question between what parties it is made: whether between citizens, or between a citizen and a foreigner, or between foreigners.

No question as to nationality of parties. *Story*, § 340.

'The rule is not founded upon the allegiance due from citizens or subjects to their respective governments, but upon the presumption of law that the parties to a contract are connusant of the laws of the country where the contract is made.' (Story —Conflict of Laws, § 340.)

But the question always to be considered is, whether the foreign discharge is absolute in the country where it was given.

Foreign discharge to be absolute.

Thus, in *Quelin* v. *Moisson*, the Privy Council held that a bankrupt discharged under the laws of France could not be sued in England either for a debt proved under it, or for a debt not proved under it.

Before coming to a decision, the following questions were put to a French advocate:—

i. Could a person whose property had passed to the Syndics under the law '*de la faillite*' afterwards be sued by any creditor who had proved his debt before the Syndics?

ii. Did he lose this protection by a sentence '*par contumace*' as a fraudulent bankrupt?

The answers were:—

i. He could not be sued even by one who had not proved.

ii. The sentence '*par contumace*' did not give any creditor a new right to sue.

So, if there is not a complete discharge of his effects as well as of his person, it will not be recognised as a discharge in any other country.

Discharge equivalent to *cessio bonorum* not recognised.

In *ex parte Burton*, this question was raised as to a composition in Holland: In that country proceedings are adopted similar to the *cessio bonorum* among the Romans, by which the debtor is only exempt from imprisonment, his debts remaining until fully paid. The composition was therefore held not to have discharged the obligation.

exp: Burton. 3 M. D. & D. 364.

But

Discharge by country not of contract.

β. Where the discharge is by the Courts of a country not the country of the Contract,

the question is very difficult of solution:—Is an obligation, contracted in one country, extinguished by a discharge under the laws of another country?

Westlake. Comity should declare obligation extinguished.

'There seems to be no juristic principle,' says Westlake, 'which compels an affirmative answer. 'But the case is eminently one for the application 'of Comity between those nations which have instituted such discharges in their respective systems 'of law. The maxim that they are granted by the 'jurisdiction of the debtor's domicil becomes a part 'of the knowledge with which men are presumed to 'contract.'

Story, § 342. The obligation is not extinguished.

But Story very positively asserts that the opposite doctrine, namely, 'that a discharge of a contract by 'the law of a place where the contract was not 'made, or to be performed, will not be a discharge 'of it in any other country.

2 Bell. § 1267, pp: 688—692, 5th ed: 3 Burge. pt: 2, ch: 22, pp: 924—929.

The authorities in support of Story's proposition are, Bell's Commentaries; Burge's Commentaries on Colonial and Foreign Law; and the following cases:—

Quin v. *Keefe*[1]

Smith v. *Buchanan*[2]

Lewis v. *Owen*[3]

[1] 2 H. Bl: 553.
[2] 1 East, 6.
[3] 4 B. & Ald: 654.

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Phillips v. *Allan*[4]

Bartley v. *Hodges*[5]

and the Scotch case *Rose* v. *M'Leod*.[6]

[4] 8 B. & C. 477.
[5] 30 L. J: Q. B. 352.
[6] 4 Shaw & Dun: 308.

Of these, the most important is *Smith* v. *Buchanan*: The contract was entered into in England: the discharge was under an Insolvent Act in Maryland, U.S.: Lord Kenyon held that the discharge was no bar to a suit upon the contract in the English Courts:—'It is impossible to say that a contract 'made in one country is to be governed by the 'laws of another. It might as well be contended 'that, if the State of Maryland had enacted that no 'debts due from its own subjects to the subjects of 'England should be paid, the plaintiff would have 'been bound by it. This is the case of a contract 'lawfully made by a subject in this country, which 'he resorts to a Court of Justice to enforce; but the 'only answer given is, that a law has been made in 'a foreign country to discharge these defendants 'from their debts on condition of their having 'relinquished all their property to their creditors. 'But how is that an answer to a subject of this 'country, suing on a lawful contract made here? 'How can it be pretended that he is bound by a 'condition to which he has given no assent, either 'express or implied?'

Smith v. *Buchanan.* 1 East, 6.

Ld: Kenyon, C.J.

Wolff v. *Oxholm.* 6 M. & S. 92.

Thus, in *Wolff* v. *Oxholm*, a receipt in accordance with an arbitrary ordinance made by the government of Denmark pending hostilities with Great Britain, specifying a rate at which debts owing by Danes to Englishmen were to be paid, was held to be no answer to an action here against the Dane for the debt; the ordinance not being conformable to the usage of nations.

Extension of doctrine.

Story thus extends the doctrine:—'If a state 'should by its own laws provide that a discharge of

Story, § 348. 'an insolvent debtor under its own laws should be a 'discharge of all the contracts, even of those made 'in a foreign country, its own Courts would be 'bound by such provisions. But they would or 'might be held mere nullities in every other 'country.'

Upon this point therefore the two great and learned writers upon the subject are in opposition to each other. Westlake indeed has gone to the extent of asserting that 'there seems to be some 'advance towards the establishment of the comity' he contends for: and he takes the case of *Edwards* v. *Ronald* before the Privy Council, as finally establishing the doctrine.

Edwards v. *Ronald*. 1 Knapp. 259.

Discharges under Act of United Kingdom absolute throughout United Kingdom.

But *Edwards* v. *Ronald* is one of a class of cases which apparently go some length towards supporting this principle, but which were explained in *Bartley* v. *Hodges*, three years after Mr: Westlake's book appeared; and again in *Ellis* v. *M'Henry*.

Bartley v. *Hodges*. 30 L. J: Q. B. 352. *Ellis* v. *M'Henry*. L. R. 6 C. P. 228.

The Privy Council held that a certificate of conformity obtained under a commission of Bankruptcy in England was a bar to an action for a debt contracted by the bankrupt in Calcutta previous to his bankruptcy; although the creditor had no notice of the commission, and was resident in Calcutta.

So in *Sidaway* v. *Hay*, a debt contracted in England by a trader residing in Scotland was held to be barred by a discharge under a sequestration in conformity with 54 G. III. c. 137; in like manner as debts contracted in Scotland.

Sidaway v. *Hay*. 3 B. & C. 12.

The principle upon which these cases proceeded was pointed out by Bayley, J., in *Phillips* v. *Allan*, and his explanation was approved in the two recent cases mentioned above:—'A discharge of a debt 'pursuant to the provisions of an Act of Parliament

Phillips v. *Allan*. 8 B. & C. 477.

Bayley, J.

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'of the United Kingdom, which is competent to 'legislate for every part of the kingdom, and to 'bind the rights of all persons residing either in 'England or Scotland, and which purports to bind 'subjects in England and Scotland, operates as a 'discharge in both countries.'

Philpotts v. *Read.* 9 Mo: 623.

Thus, in *Philpotts* v. *Read*, an insolvent's certificate in Newfoundland under 49 G. III. c. 27, s. 8 was pleaded in bar to an action in England for a debt contracted in England prior to the insolvency:

> Section 8 provides 'that a certificate obtained under a 'declaration of insolvency in Newfoundland, shall, when 'pleaded, be a bar to all suits for debts contracted in 'Newfoundland and in Great Britain prior to the insol- 'vency.' 49 G. III. c. 27, s. 8.

We may now proceed to notice some of the decisions of the Scotch Courts.

Scotch decisions.

Ferguson v. *Spencer.* 10 L. J: C. P. 20.

In *Ferguson* v. *Spencer*, the right to sue in an English Court on an English contract was held to pass to the assignees under an Irish Bankruptcy Act; 'the Act being that of the Imperial Parlia- 'ment.' (Wightman, J.—*Bartley* v. *Hodges*.)

Bartley v. *Hodges.* 30 L. J: Q. B. 352.

Royal Bk: v. *Cuthbert.* 1 Rose, 462. App:

Selkrig v. *Davis.* 2 Rose, 291.

In the *Royal Bank of Scotland* v. *Cuthbert* (or *Stein's case*) and in *Selkrig* v. *Davis*, the Court of Session held that the Commission of Bankruptcy vested the personalty of the bankrupt in the assignees wherever situate: And in the former case we find that the Court were also unanimously of opinion that the English certificate was a complete discharge of every debt that could be proved under the commission whether English or Scotch. But since foreign debts may be proved under the English bankruptcy, they would appear to be included in this decision; and Mr: Westlake evidently assumes that such was the meaning of

the Court, since he says that the case is overruled by *Rose* v. *M'Leod*. If the Court meant to confine this expression of opinion merely to English or Scotch debts, then it falls within the same principle as *Ferguson* v. *Spencer*. And since Lord Meadowbank was one of the judges both in *Stein's case* and in *Rose* v. *M'Leod*, it may be presumed that this is the correct interpretation of the decision.

Rose v. *M'Leod*. 4 Shaw & Dunlop, 308.

Ferguson v. *Spencer*. 10 L. J: C. P. 20.

In *Rose* v. *M'Leod*, a debt contracted and payable in Berbice was held not to be discharged by a certificate under an English Commission of Bankruptcy.

The following also are important Scotch decisions on the subject of a Foreign Bankruptcy :—

Colville v. *James* (Sc : Ses : Ca : 3rd Ser : Vol I., p. 41).
Young v. *Buckel* („ „ „ „ II., p. 1077).
Goetze v. *Aders* („ 4th „ „ II., p. 153)
citing,
Strother v. *Read*, and
Maitland v. *Hoffman*,
Phosphate Sewage Co : v. *Lawson* („ „ „ V., p. 1125).

Doctrine absolutely settled.

Bartley v. *Hodges* and *Ellis* v. *M'Henry* have then completely established the doctrine that an obligation is not destroyed by a discharge under the laws of a country not the country of the contract: all the judges, Wightman and Blackburn, JJ.; Bovill, C.J., Brett and Willes, JJ., approving Story's proposition, and Lord Kenyon's reasoning in *Smith* v. *Buchanan*.

Bartley v. *Hodges*. 30 L. J: Q. B. 352.

Ellis v. *M'Henry*. L. R: 6 C. P. 228.

Smith v. *Buchanan*. 1 East, 6.

Result.

Hypothetical case.

We have therefore this result :—

a contract entered into in France :—a discharge under the Bankruptcy Laws of England :—in an action in the French Courts on the contract, they will be justified in

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refusing to acknowledge the English discharge.

All obligations discharged in courts of country granting discharge.

But, since foreign debts are proveable under the English Bankruptcy Laws, and the discharge and certificate under those laws protect the goods and the person from all debts proveable under the commission (*Davis* v. *Shapley*); in the English Courts the debtor will be held to be discharged from all his debts and obligations whether English or foreign. Thus in *Armani* v. *Castrique*, Pollock, C.B., said:—'I have no doubt that if this were a 'foreign contract, the defendant's bankruptcy would 'afford an answer to the action. Inasmuch as the 'goods of a bankrupt all over the world are vested 'in his assignees, he is discharged by his certificate. 'It would be a manifest injustice to take the pro-'perty of a bankrupt in a foreign country, and then 'to allow a foreign creditor to come and sue him 'here. The English certificate is an answer to 'every contract by the bankrupt made in any part 'of the world.' This was approved by the Privy Council in *Gill* v. *Barron*.

Davis v. *Shapley*. 1 B. & Ad. 54.

Armani v. *Castrique*. 14 L. J. Ex. 36.

Pollock, C.B.

Gill v. Barron. L. R. 2 P. C. 157.

Result.

Continuing the hypothetical case suggested above, the further result is, that

Hypothetical case continued.

> in an action in the English Courts on the same contract, they will be justified in acknowledging the English discharge. But, supposing an action brought in the French Courts, and judgment recovered: and then an action in England on the French judgment: it seems that the English Courts could not do otherwise than give effect to it; for it has proceeded strictly in accordance with the principles of International Law

recognised by our Courts; namely, that a discharge by the laws of a country which is not the country of the contract does not release the debtor from the obligation.

Story's extension of the doctrine applies to England. cf: p. 217.

England therefore is one of those States 'by its 'own laws providing that a discharge of an insolvent 'debtor under its own laws is a discharge of all the 'contracts, even of those made in a foreign country. 'Its own Courts have declared this to be the law.' Therefore such judgments would or might be held mere nullities in every other country.

To complete the illustration afforded by the hypothetical case :—

Hypothetical case concluded.

The action brought on the contract in England: the defendant's plea of bankruptcy and discharge held good: The French Courts would be justified in refusing to acknowledge such judgment, and in allowing the plaintiff to recover on his contract.

General summary.

It is believed that the bankruptcy laws of France and of Germany are similar in this respect to the English. A discharge under the laws of either of these States is therefore not recognised in the English Courts (although, it is to be remembered, the principle of the judgment is in accordance with the English practice), because it proceeds upon a violation of International Law;—one State depriving of his rights a subject of another State who has not in any way submitted to its jurisdiction.

It is believed also that the laws of the United States do not arrogate to themselves that right of discharging foreign obligations which is claimed by the English laws.

A discharge under such laws therefore, coming

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before the English Courts is in reality recognised so far as it goes: that is to say, the English Courts do not refuse to be bound by it, because it does not profess to bind them.

But, were it possible to ascertain the laws of every country, it is not improbable that among the majority of States the result might be found to be, that a similarity exists in their laws to those of England:—Were this so, then it is suggested, with all submission, that the case is indeed 'eminently one for the application of comity.' cf: p. 216.

Odwin v. Forbes. 1 Buck, C. B. 57.

The case of *Odwin* v. *Forbes* must be noticed, as it is the only one in which the opposite doctrine appears to have been acted upon, and a foreign discharge admitted. A very careful and elaborate judgment was delivered by the President of the Court in Demerara, which was approved by the Privy Council. The judgment concluded thus:—

Judgment of President of Court of Demerara.

'On the strength of cases and opinions, and on the 'principle of comity and reciprocity which had been 'shewn to exist between England and Holland in 'matters of bankruptcy, and still further on the 'grounds that the effect of the certificate ought in 'justice to be co-extensive with the assignment, 'and that if foreign Courts allowed the assignees 'under the English commission to strip the debtor 'of his property by giving effect to the assignment 'within their jurisdiction, they were bound in justice 'to give equal effect to the certificate, and not leave 'him liable to the actions of the foreign creditors.'

The English certificate was admitted accordingly.

It must however be remembered that whereas the assignment deals with the property of the debtor, the discharge affects the property of his

creditors, which consideration might be sufficient to account for any difference in the effect accorded to them.

Application of principle of *Heather* v. *Webb* to foreign judgments.

In *Heather* v. *Webb*, the Court of Common Pleas held that an action could not be maintained on a promise to pay a debt from which the debtor had been released by a discharge in bankruptcy. *Heather* v. *Webb.* L. R. 2 C. P. D. 1.

The principle of the case being that the English release from obligation is absolute, it is presumed that the same principle will apply to foreign bankruptcies when the discharge by the foreign Court is also absolute.

iv. Personal Status of the Bankrupt.

Personal *status* of bankrupt: Not recognised internationally.

The Courts of one country do not regard in any way the personal status of the bankrupt of another country. In some States bankruptcy is regarded as a criminal act, and the debtor liable to imprisonment; but this is a matter concerning the State alone, provided by it as a deterrent to its subjects; it therefore can have no extra-territorial effect.

Judgments determining *status* are *in rem*.

The judgments we have been considering determine the *status* of the individual, in the same manner as judgments *in rem* determine the *status* of the chattel with reference to property; they clothe him with that status as against everybody else; It follows that they also are *in rem*, and must therefore be recognised as binding, not only as between the parties to the suit, but in all suits and by all parties. (cf: Brett, L.J.—*Niboyet* v. *Niboyet*.) *Niboyet* v. *Niboyet.* L. R. 4 P. Div: 1.

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CONCLUSION.

Professor Tyndall has said that a Theory is a principle or conception of the mind which accounts for observed facts, and which helps us to look for and predict facts not yet observed: That every new discovery which fits into a Theory strengthens it: That a Theory is not complete from the first, but a thing which grows as it were asymptotically towards certainty.

In conclusion, it may therefore not be inappropriate to trace the 'asymptotic growth towards certainty' which this Theory of Foreign Judgments has undergone.

Springing immediately from Lord Blackburn's judgments in *Godard* v. *Gray* and *Schibsby* v. *Westenholz*, it seemed to be the most appropriate solution of the conflict between the numerous authorities upon the subject of 'Enforcing' a Judgment:

It appeared of its own strength, capable of solving the difficulty attending the reception of the many doctrines on the subject of 'Recognising' a Judgment:

It supplied a ready answer to all the difficult problems arising from the varying defences which have emanated from the fertile brain of advocates:

Expanded, it included in its application Judgments *in Rem*:

And finally, Judgments of *Status*; coinciding in this last step with all the authorities.

It has to contend with many received notions upon the subject: more especially with that which endows the foreign judgment creditor with power to treat the judgment as a debt in England To remove this idea has been the object of the theoretical considerations contained in the first Chapter; and once removed, many difficulties attending the rejection of certain defences seem also to disappear.

It must now bide its time, until that free conflict of discovery, argument and opinion has taken place, and won for it recognition.

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